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Nos. 81-31, 81-228 and 81-455

In the Supreme Court of the United States

OCTOBER TERM, 1981

CALIFORNIA, ET AL.,

Appellants

v.

GRACE BRETHREN CHURCH, ET AL.

UNITED STATES, ET AL.,

Appellants

v.

GRACE BRETHREN CHURCH, ET AL.

GRACE BRETHREN CHURCH, ET AL.

v.

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOINT APPENDIX

JURISDICTIONAL STATEMENTS FILED JULY 8, 1981,
AUGUST 3, 1981 AND SEPTEMBER 1, 1981
JURISDICTION POSTPONED TO HEARING ON THE MERITS
NOVEMBER 2, 1981

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL DOCKET

Date	Nr.	Proceedings
1-8-79	kp	1. Fld cplt. Issd sums. Case may be referred to Mag. Kronenberg
1/23/79	rlb	2. Fld USM's srv of process rtnd srvd 1/15/79 on F. Ray Marshall; State of Calif and Martin R. Glick on 1/16/79.
2/2/79	rlb	3. Fld State defts' ANSWER to COMPLAINT & CROSS-CLAIM. Issd summs.
*1/31/79	rlb	4. Fld sep summs, (Govt) rtnd srvd 1/16/79 on Dept of Labor.
2/13/79	rlb	5. Fld app for & ORD allowing Phillip J. Murren to appear & naming Robert L. Toms as local cnsl.
		6. Fld app for & ORD allowing William B. Ball to appeal as nonresident atty & naming Robert L. Toms as local cnsl.
2/16/79	rlb	7. Fld plfs' ntc of mot & mot, rtnble 3/19/79, 9:30am, for prlm inj.
		8. Fld plf's memo in suppt of P/As in suppt mot for prlm inj.
		LODGED proposed OSC re prelm inj.
2/27/79	rlb	9. Fld summs on x-clm rtnd srvd 2/15/79.
3/5/79	rlb	LODGED plfs' proposed ord, inj.
3/6/79	rlb	10. Fld OSC, rtnble 3/29/79, 1:30pm re prlm inj.
3/8/79	rlb	11. Fld defts' ntc of mot & mot, rtnble 3/29/79, 1:30pm, for dsml.

Date	Nr.	Proceedings
		12. Fld plfts' amnd ntc of mot & mot, rtnble 3/29/79, 1:30pm forprlm inj.
		13. Fld plfs' proof of srv by mail of memo of P/AS.
		14. Fld plfs' proof of srv of OSC re prlm inj.
		15. Fld stip & ORD thereon contg all P/T mots to 3/29/79, 1:30pm.
3/9/79	rlb	LODGED defts' proposed ord dsmg plf's cmplt.
*3/8/79	rlb	16. Fld Fed deft's memo of P/As in suppt Mot to dsm.
3/15/79	rlb	17. Fld defts Department's memo of P/As in opp to mot to dsm.
		18. Fld defts Department's memo of P/As in opp to mot for prlm inj.
3/19/79	rlb	19. Fld Fed deft's memo of P/As in opp to plfs' mot for prlm inj.
3/20/79	rlb	20. Fld stip & ORD thereon that Fed deft's mot to dsm be hrd 3/29/79, 1:30pm; plf opp papers be fld on or bf 3/23/79 & reply 3/27/79.
3/26/79	rlb	21. Fld dclrtn of Royer in suppt plfs' mot for prlm inj.
		22. Fld dclrtn of Sidney & Patricia Bowen in suppt plfs' mot for prlm inj.
		23. Fld plfs' erata sheet & suppl memo of P/As in suppt of mot for prlm inj.
		24. Fld plfs' dclrtn of Rev. Hocking in suppt plfs' mot for prlm inj.
		25. Fld plfs' memo of P/As in opp Fed defts' mot to dsm.

Date	Nr.	Proceedings
3/29/79	jld	26. Fld dft Dept of Labor memo P/A in suprt of fed dft mtn to dism cross-claim Stmnt of Case.
3/29/79	jld	27. Min/Ord—Mtn of plntf for prelim injunct are ord cont to 3/30/79, 9:00 AM.
3/30/79	jld	28. Min/Ord—Mtn of defts to dism; mtn of plntf for prelim injunct; & mtn of gov dfts to dism State of CA X-claim tkn under submission.
*3/29/79	rlb	29. Fld defts ntc of mot & mot, rtnble 3/30/79 at 9am
5/4/79	rlb	30. Fld State defts suppl memo of P/AS in opp to mot for prlm inj.
		31. Fld dclrtn of Bratt.
5/11/79	rlb	32. Fld Fed deft's suppl memo.
5/18/79	rlb	33. Fld plfs' memo of P/As on adm entanglements
		34. thru 40. Fld (7 separate) dclrtns of Helen E. Radawski; Dean A. Ohlman; Mildred Feit; Robin Marshall; Eloise Brown; Dr. Reuben Sequeira; J. Thomas Cook.
5/23/79	rlb	35. MIN ORD: Cnsl mk fur argument on previously sub mots: Mots Remain under Submission.
6/1/79	rlb	36. Fld State defts' opp to Fed defts' mot to dsm x-clm.
9/21/79	rlb	37. Fld ORD that defts State & Martin Glick are enjoined frm collecting unemployment ins tax frm plfs Grace Brethern Church and plf The Lutheran Church-Missouri Synod; that plf Grace

Date	Nr.	Proceedings
		Brethern post bond In sun of $1,000.00 & plf Luthern Church—Missouri Synod post bond in sum of $5,000.00; Mot of Sec of Labor to be dsmd is Denied; Mot of Sec to dsm State's x-clm is Granted. (Ent 9/25/79 m/cpys ntfd prtys)
	38.	Fld OPINION.
	39.	Fld stip & ORD that the amt of bond on inj be $1,000.00.
10-15-79	mn	40. Fld defts notc of motn & motn for clarifcatn retble 11-19-79, 9:30 AM.
	41.	Fld defts argument in support of motn for clarificatn.
10/25/79	rlb	42. Fld plfs' Document Of Title of $1,000.00. Deposited into Registry of Court.
11/5/79	rlb	43. Fld stip & ORD contg mot for clarification to 12/3/79. 9:30am.
11/19/79	fb	44. Fld deft's USA, Sec Of Labor NOTICE OF APPEAL to the 9th Cir. C/A fr ord ent on 9/25/79.
11/21/79	rlb	45. Fld plfs' resp to mot for clarification.
11/27/79	rlb	46. Fld Federal defts' designation of reporters' transcript of prcdngs.
11/29/79	rlb	47. Fld stip & ORD that plfs rsp papers to State Deft's mot for clarification will be fld 11/21/79.
11-30-79	lw	48. Fld State defts' NOTC OF APPEAL to 9th Cir C/A frm Ord ent 9-25-79. 70.00 fldng & docket fees pd.
11/29/79	fb	Fld orig of Reptr's transc of prcdgs had on 3/29/79 & 3/30/79 Vol 1; 52/23/79 Vol 2.

Date	Nr.		Proceedings
12/3/79	rlb	49.	MIN ORD: HRG State of Calif's mot for clarification: Crt states no inj issd agnst Fed defts; Fur hrg contd to 1/28/80, 11am
12/13/79	nm	50.	Fld Stip & ORD re hrg on prelim inj set on cal 1/28/80 11am., & briefing schedule.
12/24/79	rlb	51.	Fld State & Martin Glick's ntc Of non designation of reporter's transcript of prcdngs.
12/26/79	nm	52.	Fld Federal Deft's declar to Joseph A. Hickey.
		53.	Fld Pltf's Lutheran Church's declar of C. Schlimpert, L. Schulz, W. Hampton, A. Baumgartel, R. Dueker, D. Schulteis & N. Young.
12/21/79	nm	54.	Fld Stip re # of separately inc scholls.
		55.	Fld Pltfs' declar of August C. Enderlin.
12/28/79	cm	56.	Fld Stip & ORD(MRP) ext ti to fle declaratns to 12/28/79.
		57.	Fld pltf's declaratn of W.G. Kelly.
1/2/80	cm	58.	Fld dft's 2nd supmntl memo.
1/4/80	rlb	59.	Fld plfs' opening brief on issue of status of non-church religious schools
		60.	Fld plfs' memo of P/As in suppt of prlm inj.
		61.	Fld State defts opening brief in opp to prln inj.
1/8/80	rlb	62.	Fld plfs Lutheran Church's proof of srv of memo of P/As etc.
1/15/80	rlb	63.	Fld plfs' 2nd memo of P/As in suppt prlm inj re sep Inc. Schools.

Date	Nr.		Proceedings
*1/10/80	rlb	64.	Fld plfs' ntc of attys chng of address & telephone #.
1/17/80	rlb	65.	Fld plf Lutheran Church's proof of srv of 2nd memo of P/As, etc.
1/28/80	rlb	66.	MIN ORD: HRG State of Ca. mot for clarification prlm Inj: Crt tks mot under Submission.
5/6/80	rlb	67.	MIN ORD: Crt's ruling on prlm inj: ORD prlm inj Granted in part & Denied in part; Cnsl to ntfy clk as to setting of stat conf; Ord bond to stand; Crt to prep ord On prlmn inj.
5/23/80	rlb	68.	MIN ORD: Crt sets stat conf for 5/30/80, 9:30am.
5/30/80	rlb	69.	MIN ORD: Stat Conf: Sets P/T for dt of C/T on 7/23/80, 9:30am.
6/2/80	rlb	70.	Fld ORD Granting prlm inj.
		71.	Fld Crt's supplemental Opinion.
7-1-80	lf	72.	Fld Stip & ORD that trial is set for 8-12-80, memo of contentns of fact & law due 7-28-80; prop PTC ord due 8-6-80
7-28-80	sb	73.	Fld pltf's memo of contention of facts & law
		74.	Fld memo of contention on facts & law of deft's State of Ca Employment Devel & Marvin Glick
		75.	Fld pltf's Lutheran Chruch Missouri Synod et al memo of contention of facts & law
		76.	Fld Federal deft memo of contention of facts & law

Date	Nr.	Proceedings
8/4/80	rlb	77. MIN ORD: Hrg flng & sprdng jdgmt frm USCCA dsmg appeal: ORD Mandate fld & sprd; Fld cc jdgmt USCCA dsmg appeal upon stip. (Ent 8/6/80)
8/7/80	rz	LODGED pltfs PTC ord retnbl 8/12/80, 9:30 AM
8/8/80	rz	78. Fld attys fr State of CA Employment Department & Martin Glick note of mot; mot fr ord establishg class actn; memo of P/A in suppt thereof; aff of Paul Cunningham; aff of Donald Louie; aff of James M. Bratt set fr 9/8/80, 9:30AM
	rz	79. Fld attys fr State of CA Employment Development Department & Martin Glick obj of State of CA Employment Development Department & Martin Glick to PTC ord in #CV-79-162-MRP
8/12/80	rz	80. Fld pltfs suppl list of exhs
	rz	81. Fld pltfs amendmnt to PTC ORD set fr 8/12/80, 9:30AM
8/13/80	rz	81. Fld stip & ORD re PTC set fr 8/12/80, 9:30AM
*8/12/80	rz	82. Fld pltfs PTC ORD retnbl 8/12/80, 9:30AM
*7/28/80	rz	83. Fld letter from Harry Sheinfeld re obj to admission at trial of certain material previously presented to the crt by pltfs
8-14-80	sb	84. MIN ORD: fur C/T (3rd day) cnsl argue cnsl stip to breifing schedule at which ti the amtter will be tkn under submission
*8-13-80	sb	85. MINORD: Fur C/T to cont on 8-14-80 9:30pm

Date	Nr.		Proceedings
*8-12-80	sb	86.	MIN ORD: P/T C/T 1st day comt 8-13-80 9:30am
8/14/80	rz	87.	Recvd fm 9th C/A cpy of ord that appeals are dismd.
8/29/80	rz	88.	Fld stip & ORD ext ti re briefing schedule to 10/22/80
9/2/80	rlb	89.	Fld Fed defts' memo of P/As In opp to mot for estb of class action.
9/8/80	rz	90.	MIN ORD: Hrg & crt DENIES mot fr ord establishing class actn
10/23/80	rlb	91.	Fld stip re briefing schedule & ORD thereon.
10/31/80	rlb	92.	Fld plfs, post trial brief.
		93.	Fld Plfs' trial brief incld proposed finds of fact
		94.	Fld Fed defts' post trial brief.
		95.	Fld trial brief of State defts.
11/7/80	rlb	96.	Fld plfs' reply trial brief.
11/28/80	rlb	97.	Fld Crt's ntc to cnsl that its special rules to be cancelled effective 11/1/80.
12/9/80	rlb	98.	Fld dclrtn of Enderlin.
		99.	Fld plfs' ntc of mot & mot, rtnbl 1/5/81, 10am, to expedite; memo of P/As.
12/12/80	rlb	100.	Fld plfs' suppl dclrtn of Enderlin in suppt mot to expedite.
12/18/80	rlb	101.	Fld State defts' resp to plfs' mot to expedite.
1/5/81	rlb	102.	MIN ORD: Hrg plf's mot to expedite: Crt states to cnsl that the opinion will fld on or bf 2/15/81.

Date	Nr.		Proceedings
1/7/81	rlb	103.	Fld plfs' ntc of ruling on plf's mot.
2/17/81	lp	104.	MIN ORD: On crt's own mot mat is set for 2/20/81 at 1pm for a stat conf & rulng by crt.
2/19/81	lp	105.	Fld notc of cont on crt's own mot stat conf & rulng by crt sched on cal for 2/20/81 has been cont to 3/9/81 at 1:30pm for hrng.
3/9/81	lp	106.	MIN ORD: Crt states rulng on injunctn to consl. crt to prepar ord on or b/f 3/11/81.
4/3/81	lp	107.	Fld Judgmnt & ORD that defts, agents, etc are permanently enjoined & restrained fr collectng, etc., as stated in ORD as to defts State of CA, the CA Unemployment Development Dept & its Director. that defts USA, US Dept of Labor, US Secretary of Labor, agents., etc., are enjoined & restrained fr interpreting in a manner wh requires state unemployment compensation plan administrators to collect contributions on behalf of employees of church-affiliated schools who fial to prov that they spend more than 50% of their time performing strictly church duties, & fr forcing or attempting to force any other persons to adopt such an interpretation. that judgment is entered in faovr of pltf. (ENT 4/6/81) Mld cpys. Mld note ptys. MD JS-6.
4/3/81	lp	108.	Fld second supplemental opinion.
4/16/81	lp	109.	Fld Bill of Cost, retrnbl on 4/22/81 at 1:30pm. Fld pltf Bill of Costs in amt of $68.00.

Date	Nr.		Proceedings
4/29/81	mp	110.	Fld Deft's NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5/6/81	lw	111.	Fld State of Calif.'s NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5/5/81	lp		LODGED pltf proposed ord re bond.
5/11/81	lp		LODGED pltf proposed ord re bond.
5/6/81	lp	112.	Fld ORD that the $1,000.00 bond is exonerated. FUR ORD that $1,000.00 deposited with the clerk of crt by pltf, Grace Brethren Church, be retrnd to pltf, forthwith, payable to "Caldwell & Toms Trust Account.
5-15-81	cw		Per order of court disb the sum of $1,000.00 to Caldwell & Toms.
6/1/81	am	113.	Fld deft's NOTC OF APPEAL in 9th Cir C/A frm Jdgmt ent 4/6/81.
6/5/81	am	114.	Fld deft's NOTC OF APPEAL in 9th Cir C/A frm Jdgmt ent 4/6/81. $70.00 fing & docket fees pd.
7/27/81	sb	115.	Lodged cpy fr USC/A 9th Circuit Ord appellant motn fr stay of proceeding is grantes & all proceeding on this appeal before it fr 6mon whichever come first

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 79-0093 MKP (KX)

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, its Pastor; CALVARY CROSS CHURCH OF THE HIGHLANDS and REVEREND DONALD B. SHELEY, its Pastor; SCOTT MEMORIAL BAPTIST CHURCH and REVEREND TIM LAHAYE, its Pastor; CHRISTIAN UNIFIED SCHOOLS OF SAN DIEGO; REDWOOD CHRISTIAN SCHOOLS; SIDNEY BOWEN and PATRICIA BOWEN, his wife; PETER FARRELLY and SUE FARRELLY, his wife; WILLIAM TSCHANTZ and JANET TSCHANTZ, his wife; ARTHUR BRANDWOOD and CHERYL BRANDWOOD, his wife; STANLEY EDINGTON; R. FLORENCE MURTI; and R. SUZANNE ROYER, PLAINTIFFS

v.

STATE OF CALIFORNIA, acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT; The Honorable MARTIN R. GLICK, Director of Employment Development; UNITED STATES OF AMERICA, acting through the UNITED STATES DEPARTMENT OF LABOR; and The Honorable F. RAY MARSHALL, United States Secretary of Labor, DEFENDANTS

COMPLAINT FOR DECLARATORY RELIEF AND FOR PRELIMINARY AND PERMANENT INJUNCTIONS

Filed Jan. 8, 1979

STATEMENT AS TO JURISDICTION

1. This is a civil action seeking declaratory, injunctive and other equitable relief. Plaintiffs seek an injunction against the deprivation under the color of the laws of the United States and of the State of California, of rights guaranteed to them by the Constitution of the United States. The action is brought under 28 U.S.C. §§ 1331, 1343 and 1346; 42 U.S.C. § 1983; 28 U.S.C. § 2201 and 2202. The matter in controversy exceeds the sum of $10,000, exclusive of interest and costs. This action seeks (a) a declaratory judgment declaring that the interpretation by the defendant Secretary of Labor of the United States of Section 3309(b)(1) of the Federal Unemployment Tax Act and by the defendant Director of Employment Development, State of California, of Section 634.5 of the California Unemployment Insurance Code, and the resultant application of these coordinate interpretations to plaintiffs so as to impose unemployment taxes upon them and to involve government excessively in the mission of churches, are violative of rights of the plaintiffs protected by the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States, (b) an injunction to restrain the defendant State of California from applying the aforesaid Section 634.5 of the California Unemployment Insurance Code to the plaintiffs. For the convenience of the Court, said statutes are summarized in Paragraphs 25-27 of this Complaint.

PLAINTIFFS

The Church and Pastor Plaintiffs

2. The plaintiff Reverend David L. Hocking, is the pastor of Grace Brethren Church of Long Beach, Long

Beach, California. He is a citizen of the United States, a resident of the State of California and a taxpayer. Grace Brethren Church is an independent, fundamental Bible-believing-and-teaching church, an integral part of the ministry of which consists of four Grace Christian Schools, all located in California.

3. The plaintiff Reverend Donald B. Sheley, is the pastor of Calvary Cross Church of the Highlands, San Bruno, California. He is a citizen of the United States, a resident of the State of California and a taxpayer. Calvary Cross Church of the Highlands is an independent, fundamental, Bible-believing-and-teaching church, an integral part of whose ministry is Highlands Academy, located at San Bruno, California.

4. The plaintiff Reverend Tim LaHaye, is the pastor of Scott Memorial Baptist Church, San Diego, California. He is a citizen of the United States, a resident of the State of California and a taxpayer. Scott Memorial Baptist Church is an independent, fundamental, Bible-believing-and-teaching church which has as one of its integrated ministries, the Christian Unified Schools of San Diego, located in California.

5. Each of the pastor plaintiffs is a "born again" Christian and an ordained minister of the Gospel who, as the pastor of a church, is charged with the duty to bear witness to the Lord and to further the religious mission of that church through the establishing and maintaining of a religious school.

6. Each of the churches and schools is supported solely out of the free will offerings of its religious supporters and receives no local, state or federal tax support.

7. Plaintiff Christian Unified Schools of San Diego, with a central office at El Cajon, California, is a community of five fundamental, Bible-believing-and-teaching schools located in California. These schools were founded and are operated for the promoting of the Christian religion.

8. Plaintiff Redwood Christian Schools, with a central office at Castro Valley, California, is a community of four fundamental, Bible-believing-and-teaching schools located in California. These schools were founded and are operated for the promoting of the Christian religion.

The Parent Plaintiffs

9. Plaintiffs Sidney Bowen and Patricia Bowen, his wife, reside at Compton, California. They are taxpayers, citizens of the United States and residents of the State of California. They are the parents of Sidney T. Bowen, age 14, Sharon Bowen, age 11, and James Bowen, age 10, all of whom are enrolled as students in Grace Christian Schools.

10. Plaintiffs Peter Farrelly and Sue Farrelly, his wife, reside at Pacifica, California. They are taxpayers, citizens of the United States, and residents of the State of California. They are the parents of Daniel, age 13, and Ellyn, age 6, both of whom are enrolled as students in Highlands Academy.

11. Plaintiffs William Tschantz and Janet Tschantz, his wife, reside at La Mesa, California. They are taxpayers, citizens of the United States, and residents of the State of California. They are the parents of Kimberly Tschantz, age 16, Kelly Tschantz, age 14, Robert Tschantz, age 10, and Christina Tschantz, age 6, all of whom are enrolled as students in schools of Christian Unified Schools of San Diego.

12. Plaintiffs Arthur Brandwood and Cheryl Brandwood, his wife, reside at Hayward, California. They are taxpayers, citizens of the United States and residents of the State of California. They are parents of Randolph, age 8, and Arthur, age 10, both of whom are enrolled in Redwood Christian Schools.

13. The parent plaintiffs are "born again" Christians who, on account of that fact, believe that they have the duty to rear their children to know the teachings of the

Bible as the infallible word of God, and to follow Jesus Christ as their personal Savior in their daily lives.

14. The parent plaintiffs therefore believe that they have the duty in conscience to select for their children the form of education offered at the schools wherein their aforesaid children now are enrolled.

The Teacher Plaintiffs

15. The plaintiff Stanley Edington resides at San Lorenzo, California. He is a full-time teacher at Redwood Christian Schools.

16. The plaintiff R. Florence Murti resides at Daly City, California. She is a full-time teacher at Highlands Academy.

17. The plaintiff R. Suzanne Royer resides at Long Beach, California. She is a full-time teacher in Grace Christian Schools.

18. The teacher plaintiffs R. Florence Murti and R. Suzanne Royer are persons in the employ of a church and of an organization which is operated solely for religious purposes, which organization is operated, supervised, controlled and entirely supported by a church. The teacher plaintiff Stanley Edington is employed by a school which is operated solely for religious purposes. Each of the teacher plaintiffs is a "born again" Christian and is a person who has embraced teaching and the moral and religious formation of the young as a Christian apostolate.

19. The aforesaid Christian schools:

(a) are religious enterprises; the schools of Grace Brethren Church, Scott Memorial Baptist Church and Calvary Cross Church of the Highlands are conducted as an integral part of the religious mission of those churches,

(b) are institutions whose substantial, if not dominant, purpose is the inculcation of religious values,

(c) are institutions in which religion is so pervasive that a substantial portion of their function is subsumed

in the religious mission which is the only reason for the schools' existence,

(d) are institutions whose affirmative, if not dominant, policy of instruction for school children is to assure future adherents to the Christian faith by having control of their education at an early age,

(e) carry on activities, a substantial portion of which are religiously oriented,

(f) conduct and sponsor religiously oriented extracurricular activities,

(g) are housed in buildings some of whose exteriors contain identifying religious symbols, and whose interiors, such as classrooms and hallways, contain Christian religious symbols, as well as inspirational quotations from scripture and other religious doctrinal sources,

(h) are institutions which have an atmosphere in which religious instruction and religious vocations are integral in the total educational function,

(i) are institutions which are vehicles for transmitting the Christian faith to the next generation,

(j) are institutions which involve substantial religious activity and purpose,

(k) employ teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school,

(l) employ teachers who work in schools which are operated to inculcate the tenets of the Christian religion and which are dedicated to rearing children in that faith,

(m) employ teachers, all of whom are Bible-believing-and-practicing Christians, and

(n) are operated in accordance with the convictions of their memberships, sourced solely in their religion as required by the Bible, for the ultimate purpose of instructing children in the philosophy and mandates of the Scriptures, in such manner as to lay a biblically motivated educational foundation for the free choice of spiritual salvation and discipleship,

(o) do not divide instruction into "religious" and "secular" compartments, the entire ongoing life of the church-school community being religious.

20. All of the plaintiffs, and the memberships of the aforesaid churches, are believers who hold a firm religious conviction that the Bible is the inspired and inerrant Word of God and that it must serve as a source of guidance for all aspects of life and conduct. The inspired Word of God is to the plaintiffs and their members a definitive manual of convictional belief and instruction.

21. The operations of the plaintiffs are centered on the Biblical concepts that all men are sinners, and that the consequence of sin is eternal separation from God for eternity in a literal hell and that this consequence can be avoided in only one way, by trusting in Jesus Christ, alone, for one's salvation. Plaintiffs' respective memberships further believe that salvation is a free gift given by God to all who trust in Jesus Christ and that the fact of His death, burial and resurrection is a payment for all sins for those who only believe.

22. In observance of the commands of the Bible, plaintiffs, as a matter of firm conviction and practice of their respective members, operate educational ministries, all of which are conducted for the sole and ultimate purpose of spreading the Christian Gospel's Good News of the manner in which salvation is obtained, and teaching and growing in discipleship to the Lord Jesus Christ.

DEFENDANTS

23. Defendant, THE HONORABLE F. RAY MARSHALL is Secretary of Labor of the United States of America.

24. Defendant, THE HONORABLE MARTIN R. GLICK is Director of the California Employment Development Department.

25. Each individual defendant is sued individually and in his official capacity. Relief is sought against all defendants jointly and severally as well as their agents,

assistants, successors, employees, attorneys and all persons acting in concert or cooperation with them or at their direction. Defendant THE HONORABLE MARTIN R. GLICK, Director of the California Employment Development Department, acting in conformity with directives of Defendants UNITED STATES OF AMERICA and THE HONORABLE F. RAY MARSHALL, Secretary of the UNITED STATES DEPARTMENT OF LABOR, is presently, and will be, acting under color of authority and the laws of the State of California. All the defendants are engaged in the enforcement and execution of the laws of the State of California and/or the United States and more particularly the Federal Unemployment Tax Act with respect to church-schools, and rules and regulations promulgated or about to be promulgated and enforced by the defendants. Plaintiffs are and will be deprived of constitutionally protected rights by the application of these laws, rules and regulations to them. The defendants are responsible for the enforcement and execution of these laws and the promulgation and enforcement of rules and regulations against the plaintiffs.

FACTUAL ALLEGATIONS

26. In 1970, the United States Congress extended unemployment insurance coverage to include services performed for nonprofit organizations by requiring that state unemployment laws cover these services effective January 1, 1972, as a condition for federal certification of the state law for tax credit against the federal unemployment tax (Public Law 91-373). States were, however, permitted to exclude certain services from coverage, including the following services described in Section 3309 (b) of the Internal Revenue Code performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) by an employee of a school which is not an institution of higher education."

27. In 1976, Congress further amended the Federal Unemployment Tax Act to require that effective January 1, 1978, states delete the exemption under Paragraph (3) above relating to elementary and secondary schools as a condition for federal certification of the state law for tax credit against the federal unemployment tax (Public Law 94-566). The Congress left standing Paragraph (1) and (2) above. 26 U.S.C. § 3309 (b) (1) (2).

28. Section 101 of the California Unemployment Compensation Code specifies that California's unemployment compensation program is part of the federal unemployment compensation plan. Accordingly, the California Unemployment Compensation Code was amended in 1978 so as likewise to delete the exemption for employees of schools which are not institutions of higher education. Section 534.5, California Unemployment Insurance Code, as amended January 30, 1978. See 78 Cal. Legis. Serv. 17. The same enactment also added a provision, as Section 106, that "This act is necessary to implement [federal] Public Law 94-566, which is hereby deemed to be a 'federal mandate' within the meaning of Sections 2206 and 2271 of the Revenue and Taxation Code."

29. On April 18, 1978, the defendant Secretary of Labor F. Ray Marshall announced a decision that the aforesaid repeal by Congress of the exclusion from coverage of employees of schools which are not institutions of higher education was intended to result in state law coverage of church-related schools. A letter from Lawrence E. Weatherford, Administrator, Unemployment Services, U.S. Department of Labor, setting forth that decision is appended hereto as Exhibit A.

30. On May 30, 1978, Lawrence W. Rogers, Administrator of Field Operations, Employment and Training Administration, U. S. Department of Labor, issued a directive to all state employment security agencies setting forth the same decision and the reasons therefor. This directive recites, in part:

> "The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by section 3309(b)(1), FUTA [Federal Unemployment Tax Act] . . . are those *strictly church duties* performed by church employees at the school *pursuant to their church responsibilities.*" (Emphasis supplied.)

A copy of that letter is appended as Exhibit B hereto.

31. On May 22, 1978, the defendant State of California, through E. L. Sullivan, Deputy Director of the Employment Tax Division, Department of Benefit Payments, issued Division Notice No. 78-13, entitled "Church-Related Schools and Activities", to Employment Tax Division Administrators/Supervisors. The notice recognized and implemented in California the aforesaid decision of the United States Department of Labor to place employees of church-schools under compulsory unemployment compensation coverage. A copy of this Notice is appended as Exhibit C hereto.

32. In January, 1978, by undated letter to "non-profit church-related schools", signed by the aforementioned E. L. Sullivan, the Department of Benefit Payments stated that, effective January 1, 1978, such schools must be in conformity with federal law because they are subject to the mandatory coverage provisions of the California Unemployment Compensation Code. A copy of this letter is appended as Exhibit D hereto.

33. The pastor plaintiffs thereafter filed under protest with the Department the reports demanded, claiming, however, that services performed as part of their churches' educational ministries are services described

in Section 3309(b)(1) and (2) and hence are not services required to be covered by the governmental unemployment compensation program.

34. Christian Unified Schools of San Diego and Redwood Christian Schools likewise filed under protest the reports demanded, upon the belief that the imposition of the federal-state unemployment compensation program upon them was a direct violation of the rights of the said schools protected by the First and Fourteenth Amendments to the Constitution of the United States.

35. Following enactment of the 1978 amendments, demands have been made upon the plaintiff churches, to institute the State disability compensation program under Section 2601, *et seq.*, of the California Unemployment Insurance Code. See "Final Notice" dated October 6, 1978, from the State of California Department of Benefit Payments to Calvary Cross Church of the Highlands, hereto appended as Exhibit E.

36. Redwood Christian Schools had, prior to the 1978 amendments to the California Unemployment Insurance Law, instituted a private disability compensation program for the benefit of its employees. Following enactment of the 1978 amendments, demand was made upon Redwood Christian Schools to institute, in place of this private program, the State disability compensation program under Section 2601, *et seq.*, of the California Unemployment Insurance Code. Threatened with penalties, Redwood Christian Schools has complied with the State's demand. See letter of Redwood Christian Schools dated September 11, 1978, hereto appended as Exhibit F.

37. Section 2606(b) of the California Unemployment Insurance Code, as amended January 30, 1978, provides exemption from the Code's disability compensation as to service performed by an individual

> ". . . As a duly ordained priest, clergyman, rabbi, rector, vicar, pastor, or minister of religion, or by a practitioner who heals the sick by prayer in the practice of religion, or by a reader whose duty it is to conduct regular religious services of a religious

organization, or by a member of a religious order in the exercise of duties required by the order, or by any other individual performing service in the practice of religion by designation of the governing body of a religious organization and subject to discipline by, including removal by, such governing body."

38. The California Unemployment Compensation Code, as now enacted:

(1) exempts from coverage employees of religious organizations which are not churches, conventions or associations of churches or of organizations operated, supervised, controlled, or principally supported by a church or convention or association of churches; but it mandates coverage for employees of religious organizations operated primarily for religious purposes which are not operated, supervised, controlled or principally supported by a church or convention or association of churches,

(2) requires coverage of employees of non-church operated and controlled religious organizations, while the Federal Unemployment Tax Act, Section 3306(c)(8) exempts such employees from coverage.

39. Subjecting of the plaintiff churches and schools to the provisions of the California Unemployment Insurance Code and the Federal Unemployment Tax Act, is resulting and will result in substantial new financial burdens to these private, non-tax supported religious entities which burdens will have the necessary effects of either seriously impairing their ability to carry out their religious educational ministry or of forcing them to cease to carry it on.

40. The results of these burdens, with their inevitable aforesaid effects, are:

—to endanger or destroy the ability of the plaintiff parents to choose a religious education for their children through the religious educational ministries of the plaintiffs,

—to endanger or destroy the opportunity of the plaintiff teachers to carry out the religious mission to which they have dedicated themselves in the formation and education of young people as Christians,

—To endanger or destroy the opportunity of the plaintiff pastors and the religious administrators of the plaintiff schools to exercise their religious ministry in education,

—To force private, non-tax supported religious entities to abandon private disability programs which they had desired for their employees and had adjudged best suited to their organizations and to substitute a state disability program, with its costs, reporting features and sanctions which the religious entities do not desire and cannot afford.

41. Application of the California Unemployment Insurance Code, and regulations thereunder, to the plaintiff churches in the exercise of their religious ministry in education has caused, and will continue to cause, intensive administrative interrelationships between churches and the state in the form of reporting, extensive disclosures of financial information, and general governmental supervision of the unemployment compensation program.

42. Application of the California Unemployment Insurance Code and related regulations to the plaintiff churches in the exercise of their religious ministry in education involves government in the determination of questions of whether termination of employment was for "good cause". For the plaintiff institutions these questions can be religious in nature.

COUNT 1

43. The plaintiffs incorporate by reference Paragraphs 1 through 42 of the Complaint.

44. No statute of the Congress of the United States or of the State of California authorizes the defendants to impose upon churches and their religious ministries unemployment compensation coverage (including the

paying of taxes related thereto and the making of reports in relation thereto).

45. The aforesaid decision of May 30, 1978, by the defendant Secretary of Labor of the United States, and the policy thereafter adopted pursuant thereto by the defendant State of California, imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs, are therefore *ultra vires* and of no legal effect.

46. For the defendants to impose said requirements upon the plaintiffs is therefore unreasonable and arbitrary, depriving them of liberty and property in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

COUNT II

47. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

48. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the church plaintiffs and school plaintiffs violates the Free Exercise Clause of the First Amendment of the Constitution of the United States inasmuch as:

(a) it imposes a tax and other financial burdens upon purely religious activity;

(b) It imposes burdens of accounting and reporting upon religious ministries;

(c) it reaches into churches and places under an unsolicited government program of employee benefits, church employees who are engaged in carrying out a religious ministry;

(d) it burdens and endangers the ability of parents to choose a religious education for their children;

(e) it burdens and endangers the opportunity of religious teachers to carry out their religious vocation in the Christian formation and education of young people;

(f) it burdens and endangers pastors of churches and religious administrators of religious schools in the exercise of their religious ministry in education;

(g) under familiar principles of unemployment compensation law, and under the laws of California, an award of unemployment compensation may depend upon a determination having been made by a governmental entity of whether there was dismissal from employment for "just cause". Dismissal from employment from a church entity, however, may in given instances be on religious (including moral) grounds. Yet a governmental agency rendering the "just cause" determination may not base its determination upon religious principles but solely upon secular standards. Thus the churches may be required to pay unemployment compensation where dismissal was based upon religious grounds.

49. There is no compelling state interest to justify these violations of plaintiffs' religious liberty.

COUNT III

50. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

51. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs and school plaintiffs violates the Establishment Clause of the First Amendment of the Constitution of the United States inasmuch as:

(a) it embraces, and is based solely upon, a definition of religion by government, and a determination by government of what constitutes the religious mission of a church or other religious body;

(b) where a dismissal from employment by the church is based upon religious (including moral) grounds, and the governmental agency rendering a "just cause" determination takes the religious grounds into account, it engages in excessive governmental entanglements with religious contrary to the

requirements of the Establishment Clause. Here the potential for such action is present;

(c) a forbidden potential for entanglement between church and state is created by the requirements of accounting, reporting and disclosure by churches as found in the statutes and administrative regulations of the State of California relating to unemployment compensation.

COUNT IV

52. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

53. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs and school plaintiffs violates rights guaranteed to them by the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, inasmuch as the said plaintiffs will be arbitrarily deprived of rights of property and enterprise as their non-tax supported churches are burdened with the costs of an arbitrarily imposed social program.

COUNT V

54. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

55. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs denies to plaintiffs the equal protection of the laws contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, inasmuch as it arbitrarily exempts certain religious ministries from coverage while imposing coverage on others.

56. The plaintiffs have no plain, speedy or adequate remedy at law.

57. The plaintiffs will suffer immediate and irreparable injury unless injunctive relief is granted.

WHEREFORE, plaintiffs pray that the following relief be granted:

(1) That the Court declare that the religious educational ministries of the churches operated by the pastor plaintiffs and by school plaintiffs are exempt from unemployment compensation coverage by the terms of Section 3309(b)(1) and (2) of the Federal Unemployment Tax Act; that they are similarly exempt under the California Unemployment Insurance Code, Sections 634.5 and 2601 *et seq.*

(2) That, should the Court determine that the religious educational ministries operated by the pastor plaintiffs are not exempt from unemployment compensation coverage under the terms of the Federal Unemployment Tax Act (and under the California Unemployment Insurance Code, Sections 634.5 and 2601 *et seq.*), it declare those statutes unconstitutional as applied to the religious educational ministries operated by the pastor plaintiffs and school plaintiffs.

(3) That the Court preliminarily and permanently enjoin and restrain the defendants from applying to the religious educational ministries operated by the pastor plaintiffs and school plaintiffs the aforementioned provisions of the California Unemployment Insurance Code and of the Federal Unemployment Tax Act.

(4) That the Court allow the plaintiffs the costs herein and reasonable attorneys' fees and such other relief as the Court appears to be equitable and just.

Dated: January 8, 1979

ERIC NELSON LINDQUIST
ROBERT L. TOMS
LISA A. RUNQUIST
CALDWELL & TOMS
WILLIAM BENTLEY BALL
PHILIP J. MURREN
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By /s/ Eric Nelson Lindquist
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0093 MKP (KX)

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, its Pastor; CALVARY CROSS CHURCH OF THE HIGHLANDS and REVEREND DONALD B. SHELEY, its Pastor; SCOTT MEMORIAL BAPTIST CHURCH and REVEREND TIM LAHAYE, its Pastor; CHRISTIAN UNIFIED SCHOOLS OF SAN DIEGO; REDWOOD CHRISTIAN SCHOOLS; SIDNEY BOWEN and PATRICIA BOWEN, his wife; PETER FARRELLY, his wife; WILLIAM TSCHANTZ and JANET TSCHANTZ, his wife; ARTHUR BRANDWOOD and CHERYL BRANDWOOD, his wife; STANLEY EDINGTON; R. FLORENCE MURTI; and R. SUZANNE ROYER, PLAINTIFFS

v.

STATE OF CALIFORNIA, acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT; The Honorable MARTIN R. GLICK, Director of Employment Development; UNITED STATES OF AMERICA, acting through the UNITED STATES DEPARTMENT OF LABOR; and The Honorable F. RAY MARSHALL, United States Secretary of Labor, DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

ANSWER OF DEFENDANTS THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT AND MARTIN GLICK TO COMPLAINT FOR DECLARATORY RELIEF AND FOR PRELIMINARY PERMANENT INJUNCTIONS AND CROSS-CLAIM

Filed Feb. 2, 1979

COMES NOW, defendants the State of California Employment Development Department and Martin Glick (hereinafter sometimes referred to collectively as "defendants"), who, in answer to the Complaint for Declaratory Relief for Preliminary and Permanent Injunctions, admit, deny, and allege as follows:

1. In answer to the allegations contained in paragraphs 1-22, inclusive, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

2. In answer to the allegations contained in the last three (3) sentences of paragraph 25, defendants deny generally and specifically each and every allegation contained therein.

3. In answer to the allegations contained in line seventeen (17) of paragraph 28, defendants deny the words "California Unemployment Compensation Code" and allege in their place the word "California Unemployment Insurance Code" and by such reference so allege throughout the entire complaint in all places where the same words appear.

4. In answer to the allegations contained in paragraphs 33-36, inclusive, lack information or belief suffi-

cient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

5. In answer to the allegations contained in paragraph 38, deny generally and specifically each and every allegation contained therein.

6. In answer to the allegations contained in paragraph 39, defendants deny generally and specifically each and every allegation contained therein.

7. In answer to the allegations contained in paragraph 40, and in each and every subpart thereof, defendants deny generally and specifically each and every allegation contained therein.

8. In answer to the allegations contained in paragraph 41, defendants deny generally and specifically each and every allegation contained therein.

9. In answer to the allegations contained in paragraph 42, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

10. In answers to the allegations contained in paragraph 43, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

11. In answer to the allegations contained in paragraphs 44-46 inclusive, defendants deny generally and specifically each and every allegation contained therein.

12. In answer to the allegations contained in paragraph 47, defendants incorporate the answers contained in paragraphs 1-9 above, inclusive, at this point as though set forth in full.

13. In answer to the allegations contained in paragraph 48, and in each and every subpart thereof, defendants deny generally and specifically each and every allegation contained therein.

14. In answer to the allegations contained in paragraph 49, defendants deny generally and specifically each and every allegation contained therein.

15. In answer to the allegations contained in paragraph 50, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

16. In answer to the allegations contained in paragraph 51, and in each and every subpart thereof, defendants deny generally and specifically each and every allegation contained therein.

17. In answer to the allegations contained in paragraph 52, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

18. In answer to the allegations contained in paragraph 53, the Employment Development Department and Martin Glick deny generally and specifically each and every allegation contained therein.

19. In answer to the allegations contained in paragraph 54, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

20. In answer to the allegations contained in paragraphs 55-57, inclusive, defendants deny generally and specifically each and every allegation contained therein.

CROSS-CLAIM FOR DECLARATORY RELIEF

COME NOW, defendants and cross-claimants, the State of California Employment Development Department and Martin Glick as Director of the California Employment Development Department (hereinafter referred to as the "cross-claimants") and for a cause of action against defendant and cross-defendant Raymond Marshall as Secretary of Labor of the United States (hereinafter referred to as the "Secretary"), allege as follows:

1. This is a civil action for declaratory relief seeking a declaration of the interpretation of Federal Unemploy-

ment Tax Act section 3309(b)(1) and California Unemployment Insurance Code section 634.5 as such sections apply to services performed for church-run pre-schools, elementary schools, secondary schools, colleges, or universities, including but not limited to, services performed for such nonprofit organizations as the religious educational ministries of the churches operated by the pastor plaintiffs and school plaintiffs herein.

2. Jurisdiction is conferred upon this court under 28 U.S.C. section 1331 and 28 U.S.C. section 1441.

3. The Department is the duly constituted state governmental agency charged with the administration, imposition, enforcement and collection of taxes under the California Unemployment Insurance Code (hereinafter sometimes referred to as the "California Code") and was and now is subject to the control of its director, Martin Glick.

4. At all times material hereto, the Secretary was and now is a public official appointed by the President of the United States and was and now is Secretary of the United States Department of Labor. The Secretary was and now is responsible for enforcing the conformity and compliance provisions of the Federal Unemployment Tax Act (hereinafter sometimes referred to as the "Federal Act").

5. The federal government collects unemployment insurance tax from specified employers pursuant to the Federal Act. In order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, as employer is allowed a credit against his federal unemployment tax for tax paid or which would have been paid but for a reduced State tax rate pursuant to qualified State programs. The California unemployment program is now and at all times material hereto has been such a qualified State program.

6. Effective January 1, 1972, Congress amended the Federal Act to require each State, as a condition of tax credit against the federal tax for State unemployment

insurance law to extend compulsory coverage to services performed by certain employees of nonprofit organizations pursuant to Section 104 of Public Law 91-373. Simultaneously, it set forth in section 3309(b) of the *Internal Revenue Code* several categories of employment which could be excluded from qualified State unemployment insurance coverage, including services performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education."

7. Effective January 1, 1972, amended the California Code to extend unemployment insurance coverage to conform to Public Law 91-373, and to expand prior coverage of certain employees of nonprofit hospitals for disability insurance to cover the same employees for disability insurance as those newly covered for unemployment insurance. Simultaneously, it set forth in section 634.5 of the California Code several categories of excluded employment, including services performed:

> "(a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.
>
> "(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry

or by a member of a religious order in the exercise of duties required by such order.

"(c) In the employ of a school which is not an institution of higher education."

8. Effective January 1, 1978, Congress repealed the permissible exclusion contained in *Internal Revenue Code* section 3309(b)(3) set forth above for service performed "in the employ of a school which is not an institution of higher education," while retaining the permissible exclusions contained in sections 3309(b)(1) and 3309(b)(2).

9. Also effective for unemployment insurance tax purposes on January 1, 1978, and for disability tax purposes on April 1, 1978, California repealed the exclusion contained in section 634.5(c), for service performed "[i]n the employ of a school which is not an institution of higher education," while retaining the exclusions contained in section 634.5(a) and 634.5(b).

10. On April 18, 1978, the Secretary announced his decision that the deletion of section 3309(b)(3) meant that employees of church-operated schools could not be permissibly excluded from State unemployment insurance programs. A true and correct copy of the Secretary's decision is attached hereto, marked as Exhibit "A" and by this reference incorporated herein. This decision was formally communicated to States, including California, on or about May 30, 1978. A true and correct copy of this communication is attached hereto, marked as Exhibit "B" and by this reference incorporated herein. Since sometime after May 30, 1978, cross-claimants have been and are now presently attempting to collect unemployment tax as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978, until the present, from churches which operate schools, including but not limited to the religious educational ministries of the churches operated by the pastor plaintiffs and school plaintiffs herein, who have not withheld said taxes.

11. There is an existing and continuing controversy between the Secretary and cross-claimants as to the proper interpretation of the provisions of section 3309(b)(1) and (2) of the Federal Unemployment Tax Act. Cross-claimants strongly support the principle of maximum extended coverage. Cross-claimants seek a declaration as to the proper interpretation of section 3309(b)(1) and (2).

12. Cross-claimants interpret section 3309(b)(1) of the Federal Act to permit States to exclude from unemployment coverage:

a. Service performed by individuals in the employ of a church in any capacity in connection with the operation of any educational institution, including but not limited to, pre-schools, elementary schools, secondary schools, colleges, or universities;

b. Such services performed for a convention or association of churches.

13. Cross-claimants interpret section 3309(b)(2) of the Federal Act to permit States to exclude from unemployment insurance coverage service performed for any nonprofit organization by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, even when the services are not performed in the employ of a church or any other organization by section 3309(b)(1) of such Act.

14. The Secretary interprets section 3309(b)(1) and (2) of the Federal Act as requiring States, as a condition of allowance of tax credits under section 3304 of such Act, to extend compulsory unemployment insurance coverage by state law to employees of all nonprofit preschools, elementary schools and secondary schools, except that the following may be exempted:

a. Services for church schools preparing candidates for the priesthood, ministry, or rabbinate;

b. Services by church employees who perform strictly church duties pursuant to their religious responsibilities at church-run schools.

15. Pursuant to sections 3304(a)(6), 3304(c) and 3309 of the Federal Act, cross-claimants must substantially comply, and now are complying, with the Secretary's interpretation as to which services under such section 3309 must be covered by California for unemployment insurance, and which services may be permissibly excluded by California from unemployment insurance coverage. If the Secretary finds that California has failed to comply substantially with the Secretary's interpretation of such provisions, the Secretary cannot continue to certify section 634.5 of the California Unemployment Insurance Code for the purposes of allowing California employers the basic and additional tax credits against the federal tax imposed by the Federal Act. Thus, there is a continuing controversy between the cross-claimants and the Secretary as to the proper interpretation of section 3309(b)(1) and (2) of the Federal Act and the derivative interpretation of identical provisions of section 634.5 of the California Code.

WHEREFORE, defendants and cross-claimants pray that:

1. The Court determine the rights and duties of the respective parties herein;
2. The Court interpret Federal Unemployment Tax Act section 3309(b)(1) and (2) and California Unemployment Insurance Code section 634.5;
3. The Court find that the Federal Unemployment Tax Act section 3309(b)(1) and (2) and California Unemployment Insurance Code section 634.5 and 2601 et seq. are constitutional;
4. The Court find that plaintiffs' constitutional rights have not been violated;
5. The Court deny plaintiffs a preliminary injunction and a permanent injunction;

6. The Court deny plaintiffs' attorneys fees in any amount;

7. The Court award defendants and cross-claimants their costs of suit incurred herein; and

8. The Court render such other and further relief as it may deem just, necessary and proper.

Dated: 2/2/79

GEORGE DEUKMEJIAN,
Attorney General
PHILIP C. GRIFFIN,
LAWRENCE K. KEETHE,
Deputy Attorneys General

By /s/ Lawrence K. Keethe
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Attorneys for Defendants.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0093-MRP (Kx)

GRACE BRETHREN CHURCH, ETC., ET AL., PLAINTIFFS

v.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, ET AL., DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

NOTICE OF MOTION AND MOTION TO DISMISS

March 29, 1979

1:30 p.m.

Filed Mar. 8, 1979

TO: PLAINTIFFS, GRACE BRETHREN CHURCH, REVEREND DAVID L. HOCKING, CALVARY CROSS CHURCH OF THE HIGHLANDS, REVEREND DONALD B. SHELEY, SCOTT MEMORIAL BAPTIST CHURCH, REVEREND TIM LA-HAYE, CHRISTIAN UNIFIED SCHOOLS OF SAN DIEGO, REDWOOD CHRISTIAN SCHOOLS, SIDNEY and PATRICIA BOWEN, PETER and SUE FARRELLY, WILLIAM and JANET TSCHANTZ, ARTHUR and CHERYL BRANDWOOD, STANLEY EDINGTON, R. FLORENCE MURTI, R. SUZANNE ROYER, AND THEIR ATTORNEYS OF RECORD, CALDWELL & TOMS by ERICK NELSON LINDQUIST, and BALL & SKELLY by WILLIAM BENTLEY BALL; AND TO THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THEIR ATTORNEY OF RECORD, DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, LAWRENCE K. KEETHE:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on Thursday, March 29, 1979, at 1:30 p.m., the Federal Defendant, Secretary of Labor, will bring on for hearing a Motion to Dismiss in the above-captioned matter. The hearing will take place before the Honorable Mariana R. Pfaelzer, United States District Judge, in her courtroom, United States Courthouse, 312 North Spring Street, Los Angeles, California.

This Motion is made pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, on the grounds that this Court lacks jurisdiction over the subject matter of this action.

This Motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in Support of Federal Defendant's Motion to Dismiss, all pleadings, records, and files in this action, and any oral and docu-

mentary evidence that may be produced at the hearing of said Motion.

DATED: This 8th day of March, 1979.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDRICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

By /s/ Stephen E. O'Neil
STEPHEN E. O'NEIL
Assistant United States Attorney
Attorneys for Federal Defendant.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL DOCKET

Date	Nr.	Proceedings
1-12-79	dg	1. Fld petn for removal w/copy of sums & complt Case may be ref to Mag Schnieder
1/30/79	cm	2. Fld ORD (RF & MRP) dtd 1/30/79 transfng actn to the cal of Judge Pfaelzer for all fur proceedings. Attys notified.
2/1/79	cm	3. Fld dft (State of CA & Martin Glick)'s ANSWER to cmplnt & CROSS-CLAIM.
/1/79	cm	4. Fld prae & issd summons on X-claim.
1/31/79	cm	5. Fld USA's stip & ORD(RF) ext ti to rspnd to cmplt to 2/20/79.
2/20/79	cm	6. Fld pltf's notc of mtn & mtn fr prelim inj retnble 3/19/79, 9:30AM.
		7. Fld pltf's memo in supt of prelim inj.
		8. Fld pltf's declaratn in supt of mtn.
		LODGED pltf's proposed prelim inj.
2/20/79	cm	9. Fld Federal dft's memo in supt of mtn to dism.
		10. Fld dfts' notc of mtn & mtn to dism retnble 3/26/79, 10AM.
2/23/79	cm	11. Fld retrn of sumons on X-claim, srvd Raymond Marshall 2/15/79.
3/15/79	cm	12. Fld dft's memo in oppos to mtn fr prelim inj.
		13. Fld dft's memo in oppos to mtn to dism.
3/15/79	cm	14. Fld dft's memo of P/A in oppos to pltf's mtn fr prelim inj.

Date	Nr.		Proceedings
3/22/79	ab	15.	Fld pltfs' req for judicial not, hrg 3/29/79 at 1:30pm.
		16.	Fld pltfs' reply to opp to mot for prelim inj.
/29/79	jcd	17.	Fld defts' Notc of motn and motn to dsms, retbl on 3/30/79, 9:00 a.m.
/29/79	eg	18.	MIN ORD: Ord defts mot to dismiss & pltfs mot for prelim injunc contd to 3/30/79, 10AM.
/30/79	eg	19.	MIN ORD: Ord defts mot to dismiss, pltfs mot for prelim injunc & govt defts mot to dismiss State of Calif x-claim stand submitted.
/29/79	eg	20.	Fld defts memo of pts & auths in suppt of mot to dismiss x-claim.
-4-79	dg	21.	Fld dfts suppl memo of P/A in oppos to mot for prelim inj.
	dg	22.	Fld dfts declaratn of James M. Bratt
-7-79	dg	23.	Fld pltfs suppl memo of P/A in supp of mot for prelim inj.
	dg	24.	Fld pltfs declaratns of Dorothy E. White, Ellen Quandt, Sherryl Delto, Nathanael P. Lucas, Doanld A. Daucher, Laurita Westling, Wilma Smallin, Wilma Weyland, & Dean Dammann (second) in support of mot for prelim inj.
-11-79	dg	25.	Fld Federal dfts supplementary memo
-23-79	dg	26.	MIN ORD: Cnsl argu on previously submtd mots—mots remain under submission
-1-79	dg	27.	Fld dfts Employmnt Developmnt Dept & Martin Glick oppos to Fed. dfts mot to dsms cross-clm

Date	Nr.		Proceedings
9/21/79	rlb	28.	Fld ORD that defts State & Martin Glick are enjoined frm collecting unemployment ins tax frm plfs Grace Brethern Church & plf The Lutheran Church-Missouri Synod; That plf Grace Brethern Post bond In sum of $1,000.00 & plf Luthern Churdc post bond In sum of $5,000.00; Mot of Sec of Labor to be dsmd is Denied; Mot of Sec to dsm State's x-clm is Granted. (Ent 9/25/79 m/cpys & ntfd prtys)
9-21-79	yd	29.	Fld Crt Opinion
9-21-79	yd	30.	Fld Stip & ORD setting bond by pltfs' to $5,000 in suppt of prelim injunctn issued this Crt on 9-21-79; bond posted no later than 15 days after entry of stip
10-5-79	yd	31.	Fld undertkng bond for $5,000 from Fidelity & Deposit Company of Maryland, Bond #9297216
11-14-79	yd	32.	Fld pltfs resp to motn for clarificatn
11/19/79	fb	33.	Fld deft's USA, Of Labor NOTICE OF APPEAL to the 9th Cir. C/A fr ord ent on 9/25/79.
11-27-79	yd	34.	Fld deft's designatn of rptr's transcrpt of proceedngs
11-30-79	lw	35.	Fld State defts' NOTC OF APPEAL to 9th Cir C/A frm Ord ent 9-25-79.
11/29/79	fb		Fld origin of Reptr's transc of predgs had on 3/29/79, & 3/30/79 Vol 1; 5/23/79 Vol 2.
12-3-79	yd	36.	MIN ORD: Hrg re State of Calif. motn for clarificatn; Crt & cnsl confr re Govt appeal; Crt states no injunctn was issd against Fed defts; cnsl to notify Crt as

Date	Nr.	Proceedings
		to which pltfs are sep incorporatd & which are not; cnsl to stip on schedule for flng briefs & declaratns; Crt ORD fur hrg cont to 1-28-80, 11AM
12-21-79	yd	37. Fld stip re numbr of separately inc schools
12-24-79	yd	38. Fld defts notc of nondesignatn of rptr's transcrpt of proceedngs
1-28-80	yd	39. MIN ORD: Hrg State of Calif. motn for clarificatn of prelim injunctn; Crt tkes motns under submissn
5-6-80	cg	40. MIN ORD: crt ords prelim injunc grntd in prt & Denied in prt. cnsl to notify clk as to settng of status conf, crt ords bond to stand, crt to prepare ord on prelim injunc
5-23-80	lf	41. MIN ORD: crt sets stat conf for 5-30-80, 9:30AM
5-30-80	cg	42. MIN ORD: crt states to cnsl to file memo & a PTC, Crt to pre-trial matter the dy of trial, crt sets C/T for 7-23-80 at 9:30am, cnsl to file stip
7-20-80	cg	Rec'd fr the USC/A a cpy of the ord of dism of the apeal, ptys are to bear their own costs
8/4/80	rlb	43. MIN ORD: Hrg flng & sprdng jdgmt frm USCCA dsmg appeal: ORD mandate fld & sprn Fld cc jdgmt USCCA dsmg appeal upon stip. (ENT 8/6/80)
8-7-80	cg	LODGED-pltfs PTC ord
8-12-80	cg	43. Fld PTC ORDER as stated w/in this ord
9-2-80	cg	44. Fld Federal defts memo of P/A in opp to mot for establishment of class actn

Date	Nr.		Proceedings
11-28	cg	45.	Fld notc to cnsl tht effect 11-180, all procs in Judge Pfaelzers will be govnd by the FRCP for the Central Dist.
4/3/81	lp	46.	Fld ORDER & Judgmnt that second supplemental opinion fld their officers, agents, etc. are permanently enjoined & restrained fr collecting, etc. as stated in ORD. that defts USA, US Dept of Labor, US Sec of Labor, their officers, etc. are enjoined & restrained fr interpreting in a manner wh requires state unemployment compensation as indiated in ORD. Judgment is entered in favor of pltf. (ENT 4/6/81) Mld cpys Mld notc ptys. MD JS-6.
4/3/81	lp	47.	Fld second supplemental opinion.
4-10-81	lz	48.	Fld pltf/deft's BILL OF COSTS Retble 4-15-81, 130pm
4-15-81	md		Taxed costs in amt of $329.20 agnst defts.
4/29/81	mp	49.	Fld Deft's NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5-6-81	lw	50.	Fld deft State of Calif.'s NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5-12-81	sb	51.	Fld pltf's Ord re Bond $5,000.00
6/1/81	am	52.	Fld deft's NOTC OF APPEAL to 9th Cir C/A frm Jdgmt ent 4/6/81.
5/4/81	am	53.	Fld deft's NOTIC OF APPEAL to 9th Cir C/A frm Jdgmt ent 4/6/81. $70.00 fign & docket fees pd.

Date	Nr.	Proceedings
7-27-81	sb	54. Lodged USDC C/A stated appellant motn fr stay of appellate proceeding granted all proceeding on this appeal are stayed pending the Supreme Crt decison on the appeal before it or six months which come first. Ord subj to reconsideration by jusge if any opp os fld w/in 10dys of the entry of the ord
9-10-81	sb	LODGED PROP ORD
		55. Fld pltf Stip dism appeal
9-11-81	kt	56. Fld ORD(MRP) that appeal tkn by US Secy of Labor to the Supreme Court of the U.S. frm jdmt of this crt is dism (ENT 9-15-81)

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C266586

THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit, membership corporation, on behalf of 85 member Lutheran Churches located in California; ST. JOHN'S LUTHERAN CHURCH, a nonprofit corporation; VIVADELL KEISER, an individual, PLAINTIFFS

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; MARTIN GLICK, as Director of the State of California Employment Department; RAYMOND MARSHALL, as Secretary of Labor of the United States; DOES 1 through 1000, DEFENDANTS

COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION

Plaintiffs The Lutheran Church-Missouri Synod (hereinafter referred to as "Synod"), St. John's Lutheran Church (hereinafter referred to as "St. John's"), and Vivadell Keiser (hereinafter referred to as "Keiser") (hereinafter "Synod", "St. John's" and "Keiser" will sometimes be collectively referred to as "Plaintiffs") for a cause of action against the State of California Employment Development Department (hereinafter referred to as "Department"), Martin Glick, as the Director of the State of California Employment Development De-

partment (hereinafter referred to as "Director") and Raymond Marshall as Secretary of Labor of the United States (hereinafter referred to as "Secretary") and Does 1 through 1000, by this verified Complaint allege:

PARTIES

1. At all times material hereto, Synod was and now is a nonprofit, membership corporation organized and existing under and by virtue of the laws of the State of Missouri, which is qualified to and does have members in the State of California. Synod has several hundred member churches in California. Eighty-five (85) of these churches operate primary or secondary schools as an integral part of the religious mission of the church and the Synod.

2. At all times material hereto, St. John's was and now is a nonprofit corporation organized and existing under and by virtue of the laws of the State of California, and was and now is a church located in the State of California which at all times material hereto operated and now operates a primary school in the City of Orange, State of California as an integral part of the religious mission of the church and the Synod.

3. At all times material hereto, Keiser was and now is an individual employed by St. John's as a kindergarten teacher.

4. At all times material hereto, Department was and now is an agency unit created by the legislature of the State of California as part of the Employment Agency, and was and now is subject to the control of the Director.

5. At all times material hereto, the Director was and now is a public official appointed by the governor of the State of California and was and now is Director of the Department. The Director was and now is responsible for enforcing the provisions of the *California Unemployment Insurance Code*, Section 1 *et seq.* (hereinafter referred to as the "California Code").

6. At all times material hereto, Secretary was and now is a public official appointed by the President of the United States and was and now is Secretary of the United States Department of Labor. "The Secretary was and now is responsible for enforcing the provisions of the Federal Unemployment Tax Act (hereinafter referred to as the "Federal Act")."

7. The true names and capacities, whether individual, corporate, associate or otherwise of Defendants Does 1 through 1000 are unknown to Plaintiffs who, therefore, sue such Defendants by fictitious names and Plaintiffs will ask leave of Court to amend their Complaint to show their true names and capacities when they have been ascertained. Hereinafter "Department", "Director", "Secretary" and Does 1 through 1000 will sometimes be collectively referred to as "Defendants".

STATEMENT OF FACTS

8. "In California, unemployment insurance benefits are paid by the State to eligible recipients * * * from employer contributions as set forth in the California Code. The federal government also collects unemployment insurance tax from specified employers pursuant to the Federal Act." "In order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, an employer is allowed a credit against his federal unemployment tax for tax paid pursuant to qualified State programs." The California unemployment program is now and at all times material hereto has been such a qualified State program.

9. In California, disability insurance benefits are paid by the State from a fund which consists principally of employee contributions withheld from employees' wages and paid over to the State by employers. Both the unemployment insurance program and the disability insurance program are controlled by the Department.

10. Effective January 1, 1972, Congress extended the coverage under the Federal Act to include services

performed by employees of nonprofit organizations. Simultaneously, it set forth in Section 3309(b) of the *Internal Revenue Code* several categories of employment which could be excluded from qualified State unemployment insurance coverage, including services performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education."

11. Also effective January 1, 1972, California extended coverage under the California Code to include services performed for nonprofit organizations. Simultaneously, it set forth in Section 634.5 of the California Code several categories of excluded employment, including service performed:

> "(a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.
>
> "(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.
>
> "(c) In the employ of a school which is not an institution of higher education."

12. Effective January 1, 1978, Congress repealed the permissible exclusion contained in *Internal Revenue Code* Section 3309(b)(3) set forth above for service performed "in the employ of a school which is not an institution of higher education", while retaining the permissible exclusions contained in Sections 3309(b)(1) and 3309(b)(2).

13. Also effective January 1, 1978, California repealed the exclusion contained in Section 634.5(c), for service performed "[i]n the employ of a school which is not an institution of higher education," while retaining the exclusions contained in Sections 634.5(a) and 634.5(b).

14. On April 18, 1978, the Secretary announced his decision that the deletion of Section 3309(b)(3) meant that employees of church-operated schools could not be permissibly excluded from State unemployment insurance programs. A true and correct copy of the Secretary's decision is attached hereto, marked as Exhibit "1" and by this reference incorporated herein. This decision was formally communicated to States, including California, on or about May 30, 1978. A true and correct copy of this communication is attached hereto, marked as Exhibit "2" and by this reference incorporated herein. Since "sometime after May 30, 1978 the Department has been and is now attempting to collect unemployment as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978 until the present from churches which operate schools, including various members of the Synod and, in particular, St. John's."

15. In California, covered services for unemployment insurance purposes are the same as covered services for disability insurance purposes. Since sometime after May 30, 1978 the Department has been and is now attempting to collect "disability tax except in certain estoppel situations and disability tax information for the period" commencing April 1, 1978 until the present from churches which operate schools, including various

members of the Synod and, in particular, St. John's, and by payroll withholdings from employees of churches which operate schools, including employees of various members of the Synod, employees of St. John's and, in particular, Keiser.

16. The eighty-five (85) member churches of the Synod which operate primary or secondary schools employ varying members of personnel in teaching, administrative and custodial capacities. Each member church, including St. John's, has at least one such employee.

17. The eighty-five (85) member churches of the Synod which operate primary or secondary schools, including St. John's, have not withheld disability insurance from their employees. The State of California contends that the churches are "responsible for paying the tax except in certain estoppel situations for the period commencing" April 1, 1978 whether or not they have withheld the amounts from their employees.

CONTROVERSY BETWEEN THE PARTIES

18. There is a controversy between the Plaintiffs and the Defendants as to whether Plaintiffs are required to pay unemployment insurance tax to the State of California and as to whether Plaintiffs are required to withhold and pay disability insurance tax for the services performed in the primary and secondary schools operated by Synod churches to the State of California. Plaintiffs contend and seek a declaration from this Court that they are not required to pay unemployment insurance tax and are not required to withhold and/or pay disability insurance tax for services performed in the primary and secondary schools operated by Synod churches, for each of the following reasons:

a. Collection by the Defendants from these Plaintiffs of the unemployment insurance tax and disability insurance tax on account of services performed in the primary and secondary schools operated by

Synod churches would violate the First Amendment to the Constitution of the United States in that:

(i) Such collection would be pursuant to a law respecting the establishment of religion; and

(ii) Such collection would prohibit the free exercise of religion.

b. The individuals who work at the schools operated by Synod churches are performing services "in the employ of a church or convention or association of churches" and thus, may be permissibly excluded from coverage of a qualified State unemployment insurance program pursuant to Section 3309 (b) (1) (A) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Sections 634.5 (a) of the California Unemployment Insurance Code;

c. If it should be determined that the schools operated by Synod churches are organizations separate from the church by which they are operated, the individuals who work at the schools are performing service "in the employ of . . . an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;" and, thus, may be permissibly excluded from coverage of a qualified state unemployment insurance program pursuant to Section 3309 (b) (1) (B) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Section 634.5 (a) of the California Unemployment Insurance Code.

INJURY AND DAMAGE

19. If Defendants are not compelled to refrain from collecting unemployment insurance tax and disability insurance tax from Plaintiffs for the services performed by those individuals who work at the schools operated

by Synod churches, Plaintiffs will be irreparably injured in the following respects:

a. If Plaintiffs choose not to voluntarily pay the taxes, they will be subject to civil sanctions and subject to time-consuming, vexatious and expensive audits and other administrative processes, threatened and initiated by the Defendants in their attempt to determine the amounts allegedly due;

b. If Plaintiffs voluntarily pay the taxes, they will be deprived of monies needed for the conduct of their religious activities and mission;

c. In the event that either the Plaintiffs pay or do not pay the taxes, the attempted application of the taxes will infringe on the First Amendment rights of the Plaintiffs.

OTHER REMEDIES INADEQUATE

20. Plaintiffs have no plain, speedy or adequate remedy in the ordinary course of law. Unless restrained and enjoined, Defendants have threatened to and will violate the First Amendment rights of the Plaintiffs and have threatened to and will attempt to collect the taxes from the Plaintiffs and have and will institute numerous, separate audits, collection procedures and actions for civil sanctions resulting in a multiplicity of actions and vastly increased costs to Plaintiffs. There are no adequate administrative remedies which Plaintiffs have not exhausted in that no administative board can adjudicate the Constitutional issues raised herein and in that the remaining issues are issues of law which are beyond the special competence of any administrative agency involved herein.

WHEREFORE, Plaintiffs pray judgment against Defendants as follows:

1. For a declaration that:

a. Collection by the Defendants from these Plaintiffs of the unemployment insurance tax and dis-

ability insurance tax on account of services performed in the primary and secondary schools would violate the First Amendment to the Constitution of the United States in that:

(i) Such collection would be pursuant to a law respecting the establishment of religion; and

(ii) Such collection would prohibit the free exercise of religion.

b. The individuals who work at the schools operated by Synod churches are performing services "in the employ of a church or convention or association of churches" and thus, may be permissibly excluded from coverage of a qualified State unemployment insurance program pursuant to Section 3309 (b) (1) (A) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Sections 634.5 (a) of the California Unemployment Insurance Code;

c. If it should be determined that the schools operated by Synod churches are organizations separate from the church by which they are operated, the individuals who work at the schools are performing service "in the employ of . . . an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;" and, thus, may be permissibly excluded from coverage of a qualified State unemployment insurance program pursuant to Section 3309 (b) (1) (B) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Section 634.5 (a) of the California Unemployment Insurance Code.

2. For a preliminary injunction and a permanent injunction, all enjoining Defendants and their agents, employees, representatives, all all persons acting under, in concert with them or for them:

a. From attempting to collect from Plaintiffs unemployment insurance tax or unemployment tax information for or on account of those individuals who work at the schools operated by Synod churches and, in particular, St. John's;

b. From attempting to collect from Plaintiffs disability tax or disability tax information and from requiring Plaintiffs to withhold disability insurance tax with respect to those individuals who work at the schools operated by Synod churches and, in particular, St. John's;

3. For Plaintiffs' costs of suit herein; and

4. For such other and further relief as this Court deems proper.

DATED: December 21, 1978

PAUL, HASTINGS, JANOFSKY & WALKER

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0162 MRP(SX)

THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit, membership corporation, on behalf of 85 member Lutheran Churches located in California; ST. JOHN'S LUTHERAN CHURCH, a nonprofit corporation; VIVADELL KEISER, and individual, PLAINTIFFS

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; MARTIN GLICK, as Director of the State of California Employment Department; RAYMOND MARSHALL, as Secretary of Labor of the United States; DOES 1 through 1000, DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

ANSWER OF DEFENDANTS THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT AND MARTIN GLICK TO COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION AND CROSS-CLAIM FOR DECLARATORY RELIEF

COME NOW, defendants the State of California Employment Development Department and Martin Glick (hereinafter referred to collectively as "defendants"), who, in answer to the Complaint for Declaratory Relief and Injunction, admit, deny, and allege as follows:

1. In answer to the allegations contained in paragraphs 1, 2, and 3, defendants lack information or belief at this time sufficient to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

2. In answer to the allegations contained in paragraph 4, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in paragraph 4, defendants allege that "the Employment Development Department is a statutory department of the State of California as part of the Health and Welfare Agency, and was and now is subject to the control of its director."

3. In answer to the allegations contained in the second sentence of paragraph 6, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the second sentence of paragraph 6, defendants allege that "the Secretary was and now is responsible for enforcing the conformity and compliance provisions of the Federal Unemployment Tax Act."

4. In answer to the allegations contained in the first sentence of paragraph 8, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the first sentence of paragraph 8, defendants allege that "in California, unemployment insurance benefits are paid by

the State to eligible recipients principally from employer contributions as set forth in the California Code." In answer to the allegations contained in the third sentence of paragraph 8, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the third sentence of paragraph 8, defendants allege that "in order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, an employer is allowed a credit against his federal unemployment tax for tax paid or which would have been paid but for a reduced State tax rate pursuant to qualified State programs."

5. In answer to the allegations contained in the first sentence of paragraph 10, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the first sentence of paragraph 10, defendants allege that "effective January 1, 1972 Congress amended the Federal Act to require each State, as a condition of tax credit against the federal tax for State unemployment insurance taxes imposed upon employers, to amend State unemployment insurance law to extend compulsory coverage to services performed by certain employees of nonprofit organizations pursuant to Section 104 of Public Law 91-373."

6. In answer to the allegations contained in the first sentence of paragraph 11, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the first sentence of paragraph 11, defendants allege that "effective January 1, 1972, California amended the California Code to extend unemployment insurance coverage to conform to Public Law 91-373, and to expand prior coverage of certain employees of nonprofit hospitals for disability insurance to cover the same employees for disability insurance as those newly covered for unemployment insurance."

7. In answer to the allegations contained in paragraph 13, defendants deny generally and specifically that

the effective date was "January 1, 1978" and defendants allege that "for unemployment insurance tax purposes the effective date was January 1, 1978, and for disability tax purposes the effective date was April 1, 1978."

8. In answer to the allegations contained in the last sentence of paragraph 14, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the last sentence of paragraph 14, defendants allege that "since sometime after May 30, 1978 the Department has been and is now attempting to collect unemployment tax as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978 until the present from churches which operate schools, including various members of the Synod and, in particular, St. John's."

9. In answer to the allegations contained in the first sentence of paragraph 15, defendants deny generally and specifically each and every allegation contained therein. In answer to the allegations contained in the second sentence of paragraph 15, defendants deny generally and specifically each and every allegation contained in line 21 thereof and allege in place thereof that "disability tax, except in certain estoppel situations, and disability tax information for the period. . . ."

10. In answer to the allegations contained in paragraph 16, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

11. In answer to the allegations contained in the first sentence of paragraph 17, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein. In answer to the allegations contained in second sentence of paragraph 17, defendants deny generally and specifically each and every allegation contained on line 11 thereof and allege in place thereof that "responsible for paying the tax, except in

certain estoppel situations for the period commencing. . . ."

12. In answer to the allegations contained in paragraph 18 and in each and every subpart thereof, defendants deny generally and specifically each and every material allegation contained therein, except defendants admit the material allegation contained in the first sentence thereof and further allege that the controversy also applies to "preschools."

CROSS-CLAIM FOR DECLARATORY RELIEF

COME NOW, defendants and cross-claimants, the State of California Employment Development Department and Martin Glick as Director of the California Employment Development Department (hereinafter referred to as the "cross-claimants") and for a cause of action against defendant and cross-defendant Raymond Marshall as Secretary of Labor of the United States (hereinafter referred to as the "Secretary"), allege as follows:

1. This is a civil action for declaratory relief seeking a declaration of the interpretation of Federal Unemployment Tax Act section 3309(b)(1) and California Unemployment Insurance Code section 634.5 as such sections apply to services performed for church-run preschools, elementary schools, secondary schools, colleges, or universities, including but not limited to, services performed for such nonprofit organizations as the Lutheran Church-Missouri Synod and St. John's Lutheran Church.

2. Jurisdiction is conferred upon this court under 28 U.S.C. section 1331 and 28 U.S.C. section 1441.

3. The Department is the duly constituted state governmental agency charged with the administration, imposition, enforcement and collection of taxes under the California Unemployment Insurance Code (hereinafter sometimes referred to as the "California Code") and was and now is subject to the control of its director, Martin Glick.

4. At all times material hereto, the Secretary was and now is a public official appointed by the President of the

United States and was and now is Secretary of the United States Department of Labor. The Secretary was and now is responsible for enforcing the conformity and compliance provisions of the Federal Unemployment Tax Act (hereinafter sometimes referred to as the "Federal Act").

5. The federal government collects unemployment insurance tax from specified employers pursuant to the Federal Act. In order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, as employer is allowed a credit against his federal unemployment tax for tax paid or which would have been paid but for a reduced State tax rate pursuant to qualified State programs. The California unemployment program is now and at all times material here to has been such a qualified State program.

6. Effective January 1, 1972 Congress amended the Federal Act to require each State, as a condition of tax credit against the federal tax for State unemployment insurance taxes imposed upon employers, to amend State unemployment insurance law to extend compulsory coverage to services performed by certain employees of nonprofit organizations pursuant to Section 104 of Public Law 91-373. Simultaneously, it set forth in section 3309(b) of the *Internal Revenue Code* several categories of employment which could be excluded from qualified State unemployment insurance coverage, including services performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

"(3) in the employ of a school which is not an institution of higher education."

7. Effective January 1, 1972, California amended the California Code to extend unemployment insurance coverage to conform to Public Law 91-373, and to expand prior coverage of certain employees of nonprofit hospitals for disability insurance to cover the same employees for disability insurance as those newly covered for unemployment insurance. Simultaneously, it set forth in section 634.5 of the California Code several categories of excluded employment, including service performed:

"(a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

"(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

"(c) In the employ of a school which is not an institution of higher education."

8. Effective January 1, 1978, Congress repealed the permissible exclusion contained in *Internal Revenue Code* section 3309 (b)(3) set forth above for service performed "in the employ of a school which is not an institution of higher education," while retaining the permissible exclusions contained in sections 3309(b)(1) and 3309 (b)(2).

9. Also effective for unemployment insurance tax purposes on January 1, 1978, and for disability tax purposes on April 1, 1978, California repealed the exclusion contained in section 634.5(c), for service performed "[i]n the employ of a school which is not an institution of higher education," while retaining the exclusions contained in section 634.5(a) and 634.5(b).

10. On April 18, 1978, the Secretary announced his decision that the deletion of section 3309(b)(3) meant that employees of church-operated schools could not be permissibly excluded from State unemployment insurance programs. A true and correct copy of the Secretary's decision is attached hereto, marked as Exhibit "A" and by this reference incorporated herein. This decision was formally communicated to States, including California, on or about May 30, 1978. A true and correct copy of this communication is attached hereto, marked as Exhibit "B" and by this reference incorporated herein. Since sometime after May 30, 1978, cross-claimants have been and are now presently attempting to collect unemployment tax as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978, until the present, from churches which operate schools, including various members of the Synod and, in particular, St. John's, which churches have not withheld said taxes.

11. There is an existing and continuing controversy between the Secretary and cross-claimants as to the proper interpretation of the provisions of section 3309 (b)(1) and (2) of the Federal Unemployment Tax Act. Cross-claimants strongly support the principle of maximum extended coverage. Cross-claimants seek a declaration as to the proper interpretation of section 3309 (b)(1) and (2).

12. Cross-claimants interpret section 3309(b)(1) of the Federal Act to permit States to exclude from unemployment coverage:

a. Service performed by individuals in the employ of a church in any capacity in connection with the operation of any educational institution, including but not limited to, pre-schools, elementary schools, secondary schools, colleges, or universities;

b. Such services performed for a convention or association of churches.

13. Cross-claimants interpret section 3309(b)(2) of the Federal Act to permit States to exclude from unemployment insurance coverage service performed for any nonprofit organization by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, even when the services are not performed in the employ of a church or any other organization described by section 3309(b)(1) of such Act.

14. The Secretary interprets section 3309(b)(1) and (2) of the Federal Act as requiring States, as a condition of allowance of tax credits under section 3304 of such Act, to extend compulsory unemployment insurance coverage by state law to employees of all nonprofit preschools, elementary schools and secondary schools, except that the following may be exempted:

a. Services for church schools preparing candidates for the priesthood, ministry, or rabbinate;

b. Services by church employees who perform strictly church duties pursuant to their religious responsibilities at church-run schools.

15. Pursuant to sections 3304(a)(6), 3304(c) and 3309 of the Federal Act, cross-claimants must substantially comply, and now are complying, with the Secretary's interpretation as to which services under such section 3309 must be covered by California for unemployment insurance, and which services may be permissibly excluded by California from unemployment insurance coverage. If the Secretary finds that California has failed to comply substantially with the Secretary's interpretation of such provisions, the Secretary cannot continue to certify section 634.5 of the California Unemployment Insurance Code for the purposes of allowing California employers the basic and additional tax credits against the federal tax imposed by the Federal Act. Thus, there is a continuing controversy between the cross-claimants

and the Secretary as to the proper interpretation of section 3309(b)(1) and (2) of the Federal Act and the derivative interpretation of identical provisions of section 634.5 of the California Code.

WHEREFORE, defendants and cross-claimants pray that:

1. The Court determine the rights and duties of the respective parties herein;
2. The Court interpret Federal Unemployment Tax Act section 3309(b)(1) and California Unemployment Insurance Code section 634.5;
3. The Court find that plaintiffs' First Amendment rights have not been violated;
4. Plaintiffs be denied a preliminary injunction and a permanent injunction;
5. Defendants be awarded their costs of suit incurred herein; and
6. The Court render such other and further relief as it may deem just, necessary and proper.

Dated: February 1, 1979

GEORGE DEUKMEJIAN,
Attorney General
PHILIP C. GRIFFIN,
LAWRENCE K. KEETHE,
Deputy Attorneys General

By /s/ Lawrence K. Keethe
LAWRENCE K. KEETHE

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UNITED STATES DEPARTMENT OF LABOR

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0162-MRP (SX)

THE LUTHERAN CHURCH,
MISSOURI SYNOD, ET AL., PLAINTIFFS

v.

STATE OF CALIFORNIA EMPLOYMENT
DEVELOPMENT DEPARTMENT, ET AL., DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

[March 26, 1979 at 10:00 a.m.]

NOTICE OF MOTION AND MOTION TO DISMISS

TO: PLAINTIFFS, THE LUTHERAN CHURCH-MISSOURI SYNOD, ST. JOHN'S LUTHERAN CHURCH, VIVADELL KEISER, AND THEIR ATTORNEYS OF RECORD, PAUL, HASTINGS, JANOFSKY & WALKER, BY DONALD A. DAUCHER; AND TO THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THEIR ATTORNEY OF RECORD, DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, LAWRENCE K. KEETHE:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on Monday, March 26, 1979, at 10:00 a.m., the Federal Defendant, Secretary of Labor, will bring on for hearing a Motion to Dismiss in the above-captioned matter. The hearing will take place before the Honorable Mariana R. Pfaelzer, United States District Judge, in her courtroom, United States Courthouse, 312 North Spring Street, Los Angeles, California.

This Motion is made pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, on the grounds that this Court lacks jurisdiction over the subject matter of this action.

This Motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in Support of Federal Defendant's Motion to Dismiss, all pleadings, records, and files in this action, and any oral and docu-

mentary evidence that may be produced at the hearing of said Motion.

DATED: This 20th day of February, 1979.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

By /s/ Stephen E. O'Neil
STEPHEN E. O'NEIL
Assistant U.S. Attorney

Attorneys for Federal Defendant.

PLAINTIFF'S EXHIBIT NUMBER 52

STATE OF CALIFORNIA

[SEAL]

OFFICE OF THE SECRETARY OF STATE

(PHOTOCOPY CERTIFICATION)

I, *EDMUND G. BROWN JR.*, Secretary of the State of California, hereby certify:

That the photographic reproduction hereunto annexed was prepared by and in this office from the record on file of which it purports to be a copy, and that it is full, true and correct.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this Mar. 25, 1971

/s/ Edmund G. Brown, Jr.
Secretary of State

[SEAL]

Filed June 24, 1970

ARTICLES OF INCORPORATION OF REDWOOD CHRISTIAN SCHOOLS

I

The name of this corporation shall be REDWOOD CHRISTIAN SCHOOLS.

II

The purposes for which this corporation is formed are:

(a) The specific and primary purpose is as follows:

1. To establish and conduct one or more schools of general education of a Christian character on an elementary and/or high school level.
2. To promote and/or foster and/or organize and/or supervise the type of schools specified in subparagraph 1. above.
3. The activities of the organization shall be conducted in accordance with fundamental Protestant concepts and shall be non-denominational in character.

(b) The general purposes and powers are:

1. To purchase, receive, take, acquire, hold, sell, convey or otherwise dispose of property whether real, personal or mixed.
2. To receive property by devise or bequest, subject to the laws regulating the transfer of property by will, and to otherwise acquire and hold all property, real or personal, including shares of stock, bonds and securities of other corporations.
3. To act as trustee under any trust incidental to the principal objects of the corporation, and

to receive, hold, administer, and expend funds and property subject to such trust.

4. To convey, exchange, lease, mortgage, encumber, transfer upon trust, or otherwise dispose of all property, real or personal.

5. To borrow money, contract debts, and issue bonds, notes and debentures, and secure same.

6. To contract and be contracted with.

7. To do all acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation.

Notwithstanding any statement of purposes or powers aforesaid, this corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of its religious, educational and charitable purposes.

III

This corporation is organized pursuant to the General Non-profit Corporation Law of the State of California.

IV

The county in this State where the principal office for the transaction of the business of this corporation is located, is Alameda County.

V

The names and addresses of the persons who are to act in the capacity of directors, until the selection of their successors, are:

Name	Address
WILLIAM J. BECKWITH	2137 Longview Drive San Leandro, California 94577
DONALD L. MADSEN	23098 Mansfield Avenue Hayward, California 94541
ADOLPH ODEGAARD	2187 Nina Street Hayward, California 94541

VI

The authorized number and qualifications of members of the corporation, the different classes of membership, if any, the property, voting and other rights and privileges of members, and their liability to dues and assessments and the method of collection thereof, shall be as set forth in the Bylaws.

VII

The property of this corporation is irrevocably dedicated to religious, educational and charitable purposes and no part of the net income or assets of this organization shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private persons. Upon the dissolution or winding up of the corporation its assets, remaining after payment, or provision for payment, of all debts and liabilities of this corporation, shall be distributed to a non-profit fund, foundation or corporation which is organized and operated exclusively for religious, educational and charitable purposes and which has established its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. If this corporation holds any assets in trust, such assets shall be disposed of in such manner as may be directed by decree of the Superior Court of the county in which the corporation has its principal office, upon petition therefor by the Attorney General or by any person concerned in the liquidation, in a proceeding to which the Attorney General is a party.

VIII

The existence of this corporation is perpetual.

IN WITNESS WHEREOF, the undersigned, being the persons hereinabove named as the first directors, have executed these Articles of Incorporation, this 12th day of May, 1970.

/s/ William J. Beckwith
WILLIAM J. BECKWITH

/s/ Donald L. Madsen
DONALD L. MADSEN

/s/ Adolph Odegaard
ADOLPH ODEGAARD

STATE OF CALIFORNIA)
City and) ss.
County of San Francisco)

On this 12th day of May, 1970, before me, Alice H. Strayer, a Notary Public for the State of California, with principal office in the City and County of San Francisco, personally appeared WILLIAM J. BECKWITH, DONALD L. MADSEN and ADOLPH ODEGAARD, known to me to be the persons whose names are subscribed to the within Articles of Incorporation, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year first above written.

/s/ Alice H. Strayer
Notary Public

PLAINTIFF'S EXHIBIT NUMBER 60

22776

Redwood Christian Schools, Inc.
19300 Redwood Road
Castro Valley, CA 14546

NOTICE OF APPOINTMENT

To _____Date _____

are hereby notified that the School Board has appointed you to the position of _____ for a period of _____, beginning _____ at a salary of $_____ per _____ subject to any deductions normally made by the school.

The period of active duty is from _____ to _____.

The agreement to accept this appointment is subject to the policies and regulations of the School Board regarding cooperation with the administration, loyalty to the school and its mission, efficient performance of duties, worthy conduct, conformity to school standards, and adherence to the doctrinal position of the school. The School Board reserves the right to terminate this appointment at its discretion.

This notice is effective if signed and returned by _____.

_____
Chairman of the Board

_____
Administrator

ACCEPTANCE OF APPOINTMENT

I hereby accept the above appointment subject to the conditions stated above, and promise to serve wholeheardtedly in carrying out the duties attendant to this appointment. I agree, by God's help, to live an exemplary Christian life, to work cooperatively with staff

and administration, to conform to all school standards, and to adhere to the doctrinal statement of the school.

Signed: _____

Date: _____

Enclosed: Statement of Faith

Board Copy: Please sign and return Teacher's Copy: Please keep

STATEMENT OF FAITH
OF THE
REDWOOD CHRISTIAN SCHOOL

BASIS: The basis of the Redwood Christian School shall be the Bible as interpreted by the following statement of faith.

1. We believe the Bible to be the inspired and only infallible authoritative Word of God, and inerrant as originally received.
2. We believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.
3. We believe in the deity of our Lord Jesus Christ, in His virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.
4. We believe that for salvation of lost and sinful men, regeneration by the Holy Spirit is absolutely essential.
5. We believe in the present ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a godly life.
6. We believe in the resurrection of both the saved and the lost; they that are saved unto the resurrection of life, and they that are lost unto the resurrection of damnation.
7. We believe in the spiritual unity of believers in our Lord Jesus Christ.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3763

GRACE BRETHREN CHURCH,
ETC., ET AL., PLAINTIFFS/APPELLEES

v.

STATE OF CALIFORNIA, ETC., ET AL.,
DEFENDANTS/APPELLANTS

No. 79-3764

THE LUTHERAN CHURCH-MISSOURI SYNOD, ETC., ET AL.,
PLAINTIFFS/APPELLEES

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT
DEPARTMENT, ETC., ET AL., DEFENDANTS/APPELLANTS

(1) STIPULATION FOR DISMISSAL; and

(2) ORDER OF DISMISSAL

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
STEPHEN E. O'NEIL
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1100 U.S. Courthouse
312 North Spring Street
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Los Angeles, California 90012

Attorneys for Federal Defendant/
Appellant.

STIPULATION FOR DISMISSAL

IT IS HEREBY STIPULATED by and between the parties to this appeal, Federal Defendant/Appellant, United States of America, Secretary of Labor, and the Plaintiffs/Appellees, by and through their attorneys of record, that pursuant to Rule 42(b), Federal Rules of Appellate Procedure, the instant appeal be hereby dismissed, with the parties bearing their own costs. Counsel for Appellant has been informed by the Secretary of Labor and the Department of Justice, Washington, D.C., that the instant appeal should not be prosecuted at this time.

DATED: This ——— day of ———, 1980.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division

By _____
STEPHEN E. O'NEIL
Assistant U.S. Attorney

Attorneys for Appellant,
United States of America.

DATED: This ——— day of ———, 1980.

CALDWELL & TOMS

By _____
ERIC NELSON LINDQUIST

Attorneys for Plaintiffs/Appellees,
Grace Brethren Church, et al.,
in CA 79-3763.

DATED: This ——— day of ———, 1980.

PAUL, HASTINGS, JANOFSKY
& WALKER

By _____

DONALD A. DAUCHER
Attorney for Plaintiffs/Appellees
The Lutheran Church-Missouri
Synod, et al., in CA 79-3764.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3763

DC# CV 79-0093 MRPfaelzer
C. Cal.

GRACE BRETHREN CHURCH, ETC., ET AL.,
PLAINTIFFS/APPELLEES

v.

STATE OF CALIFORNIA, ETC., ET AL.,
DEFENDANTS/APPELLANTS

No. 79-3764

DC# CV 79-0162 MRPfaelzer
C. Cal.

THE LUTHERAN CHURCH-MISSOURI SYNOD, ETC., ET AL.,
PLAINTIFFS/APPELLEES,

v.

THE STATE OF CALIFORANIA EMPLOYMENT
DEVELOPMENT DEPARTMENT, ETC., ET AL.,
DEFENDANTS/APPELLANTS

ORDER OF DISMISSAL

Having considered the Stipulation for Dismissal filed by the parties hereby pursuant to Rule 42(b), Federal Rules of Civil Procedure, the Court hereby dismisses the instant appeal.

The parties are to bear their own costs.

DATED: This 24th day of July, 1980.

/s/ Kathryn D. Freeman
Deputy Clerk

For: Richard H. Deane,
Clerk of Court

EXCERPTS FROM TRANSCRIPT OF TRIAL

AUGUST CHARLES ENDERLIN, III,

[7] called as a witness on behalf of Plaintiff Grace Brethren Church, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell your last for the record.

THE WITNESS: August Charles Enderlin, E-n-d-e-r-l-i-n, the third.

DIRECT EXAMINATION

BY MR. BALL:

Q Mr. Enderlin, what is your residence address?

A 20197 Brittany Court, Castro Valley, California.

Q Are you married?

A Yes.

Q Do you have a family?

A Yes.

Q Would you tell the Court your educational background, please.

A I graduated from Ft. Wayne Bible College with a bachelor's degree. I have taken some other extended courses in state universities.

Q Will you tell the Court of your prior occupations.

A Post high school and up through about '60 I was [8] involved in construction work, et cetera. In 1963, which was during and post-college, I was involved as a minister of Christian education at a missionary church in Ft. Wayne, Indiana.

After that I was with another missionary church as minister of Christian education there.

After that I was involved in helping to establish and to form the Ft. Wayne Christian School in Ft. Wayne, Indiana.

After that in my present position at Redwood Christian School in Castro Valley, California.

Q Mr. Enderlin, what is your religion?

A I am a born-again, practicing Christian, a believer in Jesus Christ as personal savior.

Q Will you please state for the Court your essential religious beliefs.

A Yes. There are several that I would classify as essential.

One, I believe that the Bible is the infallible, inspired word of God.

I believe that there is one God who exhibits himself in three persons: God the Father, God the Son, God the Holy Spirit.

I believe in the Deity of Jesus Christ, his [9] virgin birth, and his sinless nature.

I believe in his death, burial, resurrection, his ascension to heaven, where he is now.

I believe in the salvation of the lost. Jesus said he came to seek and to save that which was lost.

Another would be the ministry of the Holy Spirit that I believe is evident in our world today. It dwells within the heart of the believer.

And probably not last but I will conclude with this: The spiritual unit of the believers, the body, of which those at Redwood Christian School are a part of that body of believers.

Q Now, what is your present occupation?

A I am superintendent of Redwood Christian School.

Q What does that job involve?

A It involves a multitude of things. It involves the oversight of the school as it would relate to public relations, getting the message out about the school; the delegation, the relegation of finances, expenditures, budget. It involves the hiring, the training, the overseeing of faculty, teachers' staff, all personnel within the school.

It involves the oversight of curriculum development; also involves facilities, care, maintenance, etc.

[10] Probably a multitude of other things, but that probably hits the highlight.

Q How long have you been superintendent?

A I have been with the school since its inception in 1970; that would be ten years. Titles have changed during the course of that time but I have been the chief executive officer.

Q Mr. Enderlin, why did you choose this field of work?

A I believe the Lord called me into a Christian vocation. This happened several years ago. As I was involved in working with a local church ministry there involved with its governing body, I felt the Lord speak in a very tangible way to direct me into Christian vocation, which at that time I started pursuing an education in that particular area.

Q When was Redwood Christian Schools founded?

A 1970.

Q Why was it founded?

A It was founded solely for religious purposes; to educate and to train young people in the tenants of faith which we espouse.

Q Are Redwood Christian Schools a part of any named local or national church?

[11] A Yes, if you consider the church as a body of believers, which we do. Body of believers is established by Jesus Christ and as identified in the New Testament.

Q Mr. Enderlin, how are Redwood Christian Schools financed?

A Financed in two ways: One, by tuition that the parents pay for the education of their children, and the second by gifts from believers, interested people in our educational program.

Q Are there racial restrictions on admissions?

A No, there are not. In fact, as all non-profit organizations must declare a nonracial, nondiscriminatory statement, we have done this. Our school right now has

a 13 percent minority ratio in comparison to the local school district which is 11½ percent.

Q Are your schools incorporated?

A Yes, they are.

Q When did that incorporation take place?

A June the 24th, 1970.

* * * *

[17] THE WITNESS: All right. We are to teach primarily, our objectives are that the parents, board's school, so forth, are to teach that Jesus Christ is Lord Savior; that the Scripture is essential in every part of our curriculum. That we are to teach that world missions, American heritage and so forth is a part of our curriculum.

We are to teach students to think for themselves and to stand up to their convictions under pressure.

Those would all be a part of that particular order.

BY MR. BALL:

Q Now, these objectives that you just summarized, do they play any role in the school's admissions policy?

[18] A Very definitely so. I am referring again to Article VI on policy No. E.

Q What does that say?

A It says the parents and children are expected to accept the objectives and other policies that are set forth by the board.

> "Failure to do so is justification for not accepting or for expelling a student."

Q Mr. Enderlin, do your schools admit children of other religious faiths?

A Yes, we do.

Q Now, do you in any way modify your religious teaching in order to accommodate the fact that these children are of a different religious faith?

A No, we do not.

Q Can you describe your schools in terms of internal appearance?

A We would have—I guess you are referring maybe to religious symbols and so forth that might be there. You see virtually everywhere Bibles, Christian flags. There would be references to the Scripture. There would be posters and so forth identifying them as a truly genuine Christian organization, religious organization.

Q Now, what about student behavior? Is that in [19] any way related to the religious mission which you say Redwood Christian Schools has?

A Yes.

Q In what way?

A We are teaching our young people self-discipline. We are teaching them self-control. We believe that this is an important measure for their developing in Christian conduct.

Much of this we would take from the Scripture, which is our authority.

In Matthew 16 it indicates the word to "deny self" as a part of the self-discipline process.

In Colossians 3 it indicates that what we do is to bring honor and glory to God. And in James I it talks about being obedient to that word, to those teachers, to those leaders.

Q Let me ask you about your extracurricular activities. Take the athletic program, for example. Does that in any way relate to religious mission of the school?

A We believe that our total program, from beginning to end—and if you want to identify that as "curricular," extracurricular activities would fall into that—it is a constant teaching mission.

With athletics, our teams are—our coach would [20] gather for prayer before games. There would be devotions, Bible study, as a preparation for this.

We are concerned that our young people learn sportsmanship with Christian character, and that is the reason for the Bible study.

We would be concerned that our young people would control temper, which we have seen by virtue of media that anger is one of those that seems to come out. We teach our young people to control their temper, even to the point of removing a student from a game. It could even be the expulsion from that team if it was necessary in a given situation.

Q What about other extracurricular activities?

A Other activities, one of the major emphases, I would say, in our school would be our music department. We have several choirs, and they fellowship with each other in this area. Our school is involved in singing. Not—well, we are singing as the Scripture indicates; psalms, hymns, spiritual songs and so forth.

There are obviously social activities surrounding those particular events. We believe that our young people need to be whole in every area, to conduct themselves as was previously mentioned in that Colossians passage, in whatever they do to bring honor and glory to Jesus Christ. [21] And so we afford them these extracurricular activities to help further their religious training.

Q Now, do the schools regulate the dress and the appearance of students?

A Yes, we do.

Q Why is that?

A Well, the Scripture indicates, particularly in the Book of I Peter, that we are to develop primarily inner qualities; qualities of love, joy, peace, understanding, temperance, so forth—these particular qualities, and not to pay particular attention to the outer, the way that a student dresses. We feel it is important to have some regulation in order to be able to put the emphasis upon these inner qualities that we are wanting to develop.

The Scripture also indicates in I Corinthians that our body is the temple of the Holy Spirit, the dwelling place of the Holy Spirit. And as such, we feel that it is important that we communicate a standard image within our institution.

Q Now, you have mentioned Bible. What role does the Bible play in Redwood Christian Schools?

A The Scripture is the very center of our curriculum, the very center of our school. And I guess I could best describe that as a wheel and the hub, the spokes going [22] out.

The Word, the Bible, is the hub; the spokes going out are the various aspects within our educational program, curricular or extracurricular. And the outer premise of that wheel encompasses our total educational program.

Q Your schools, Mr. Enderlin, teach secular subjects?

A There are no secular subjects.

Q Are not mathematics, for example, English, biology—those are also taught in public schools and secular or non-religious schools, are they not?

A They are. But if you take the premise from the word of God that all knowledge is from Him and that He is the creator of all, then everything that we learn is a revelation of God. Just because those subjects are taught in a secular school does not devoid them of godly content; they have only denied the author of that content. And this is done in a number of situations.

Q To your knowledge, do you teach these differently than the public schools?

A Well, by virtue of our identifying their coming from God, as such, we obviously would. They would not mention that God was the originator of these subjects, so forth. So yes, there would be that basic difference of [23] teaching.

Q Does California impose curriculum requirements on your schools?

A Yes, they do.

Q Do these California requirements provide that your schools teach any courses as secular subjects?

A No, they do not.

Q Now, if they did or if California were to require your schools to teach anything offensive to the school's statement of faith, what would your reaction be?

A We would have to refuse or to oppose that standard.

* * * *

[31] Q Now, let's talk about your employees. What religious qualifications, if any, must an employee of Redwood Christian Schools have?

A They must be a practicing, born-again believer in Jesus Christ, having a personal salvation in Him.

Q Does that apply to personnel other than teachers?

A It applies to all personnel within our school system, whether it is a teacher, administrator, secretary, bookkeeper, and aide, playground person, bus driver. They all meet the same basic qualification.

Q What specific qualifications must a teacher have?

A Okay. Beyond those which I have just mentioned, then they must be academically prepared in the academic discipline that they are going to be teaching. So if they are teaching history, English, whatever, prepared in that.

Q Now, these teachers at Redwood Christian Schools, [32] are they ministers?

A Yes, I would say that they are ministers, yes.

Q Are they ordained?

A They are not ordained.

Q Well, are they licensed as ministers?

A No, they are not licensed.

Q Are they commissioned as ministers?

A Commissioned? Yes, I would say that you could identify them as "commissioned."

Q In what sense do you mean that?

A Well, in the Scripture, Jesus Christ has commissioned us to go forth and to proclaim the word of God; to identify, to teach those particular areas.

I'd like to share, if I may, a couple of passages from the Scripture to identify that. Is that permissible?

THE COURT: Yes.

THE WITNESS: I'd like to direct the attention to Romans Chapter 15. I don't have these marked and I am a little nervous—14 through 16:

> "I myself must convince my brothers that you yourselves are full of goodness, complete in knowledge and competent to instruct one another. I have written you quite boldly on some points, as if to remind [33] you of them again, because of the grace God gave me to be a minister of Jesus Christ to the Gentiles with the priestly duty of proclaiming the gospel of God so that the Gentiles might become an offering acceptable to God, sanctified by the Holy Spirit."

That particular passage uses "a minister . . . . of God," which we believe is effective in this area of teaching.

Another one that I would like to refer to is I Corinthians, Chapter 12 and Verse 28. It says:

> "Are all apostles, are all prophets, are all teachers, do all work miracles. Do all have gifts of healing, do all speak in tongues, do all interpret, but eagerly desire the greater gift."

In other words, it lists in the Scripture those that are to perform the ministry of proclaiming the gospel of Jesus Christ.

Q These teachers, are they appointed to your staff?

A They are appointed by the school to minister religious education.

Q Now, Mr. Enderlin, suppose that a teacher of math in your schools performed excellently in that branch—punctual and diligent and so on—but told the students [34] that the Bible is not the infallible word of God.

Do you have the picture?

A Yes.

Q What would the school do?

A We would dismiss that teacher. It would be contrary to our statement of faith and the purpose for which we are established.

Q Now, suppose you have a married teacher at Redwood Christian Schools, completely proficient and also loyal to doctrine in the classroom but is known to indulge in public drinking of alcohol on his or her time off.

What would the school do?

A Our position would be the same in that area. We would dismiss that teacher in regard to unbiblical, unreligious conduct.

Q Now, suppose a less dramatic situation wherein a teacher, over a period of time, becomes lacking in Christian fervor in his or her relationship to the students.

What about that situation?

THE COURT: The question you are putting is that the teacher becomes lacking in Christian fervor?

MR. BALL: Yes, your Honor.

THE COURT: All right.

THE WITNESS: One of the missions of our—

[35] BY MR. BALL:

Q In relation to your students.

A One of the missions of our school is evangelism. This has been given in some of the Scripture references that I have indicated. A teacher that would not be involved in that evangelistic mission would be, to use that term, "cool in fervor," and that teacher would probably be asked to step down as not completing the requirements of our institution.

Q Now, is Redwood Christian Schools willing to have the state or government pass upon the question of whether any of those dismissals was justified?

A Absolutely not.

Q Why not?

A Because I don't believe that the government is qualified, to be very honest with you, to administer spir-

itual decisions. These would definitely be spiritual decisions based upon the word of God, based upon biblical tenets. I don't believe that there is a level of comprehension or understanding in these particular areas. They would be very foundational for us to have a drinking individual on our faculty.

Q Well, let us suppose the situation, however, where the government is not deciding whether that person is [36] on your faculty or off your faculty, but is in some way passing upon the question of whether the dismissal was justified.

A My answer would be the same. They are not qualified to do so.

Q Now, can you describe social relationships between students and among faculty and between persons connected with your schools generally.

A I'd say there would be a community of believers, a community of faith, a unit that would be there.

Q Do your schools participate in Social Security?

A No, we do not.

Q Do your schools receive any form of local, state or federal financial assistance?

A We receive none. By virtue of our board of directors, they made a decision we would receive no federal, state funds of any sort, which would include some of the very lucrative ones of audio-visual, food and so forth.

Q Why is that?

A Well, our basic premise is, by direction of the board of directors, that if we were to receive certain funds that there would also come certain controls attached to them. We are of the persuasion that we want to respond according to the word of God and not a nonbiblical, [37] non-religious entity.

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[38] BY MR. BALL:

Q Mr. Enderlin, is chapel conducted in your schools?

A Yes, sir.

Q Would you describe your chapel operation.

A Each one of our schools has a separate chapel for elementary, junior high, high school. These would be conducted on a weekly basis for a formal total school chapel of which Scripture, singing and the presentation from the Word challenging students to godly living would be given. It takes a little different form than our daily [39] Bible class where there is a specific time of instruction in the word of God which would involve memory, et cetera.

The chapel time is one that is trying to inculcate a desire, an emphasis on the part of that student to live what he has been learning in his head. It is an emphasis to the heart.

Q Let me ask you this: During your conducting of classes at Redwood Christian Schools is there any kind of moral or religious instruction that accompanies the life in the classroom?

A That would be constant. Moral instruction would not only be in the Bible class but reading, history, all of those courses would include instruction in that area.

In fact, one of the things I think to our chagrin is that much of the reading material that is given to young people today leaves off that moral climax, that moral lesson. They are left to hang and decide for themselves, which they are incapable of doing that.

Q What about excuse me; go ahead.

A So that each of our classes are leading to moral implications for our students.

Q Does your school have any code of conduct?

A Yes, standard of conduct. It would be similar, as we previously mentioned the dress code. There are [40] standards that students—I guess you are meaning raise their hand to respond in class; that is a part of self-control that we are talking about. There are common courtesies that we are trying to espouse to our students, particularly as it relates to boy-girl relationships.

I believe that the Scripture teaches that men are to honor women as women, and so these would be common courtesies that would be taught throughout the course of the entire day as well.

Q Are you suggesting that the rules of conduct and discipline in the schools are religiously based?

A Yes, they are.

Q Now, I wanted to ask you about the minimum wage laws. Does Redwood Christian Schools comply with the minimum wage laws?

A I'm not aware that we must comply with those laws, though we have heretofore paid a wage that was above those particular wage standards. We have been able to do that probably on the basis of having a number of volunteer people that come in—parents, etc.

I was calculating the other day. We are probably given more than a thousand hours per month by these people. I am a little concerned, to be very honest with you, as those minimum wage laws continue or standards continue to climb, that it may put us into a very uncomfortable position. Thus far, we are all right.

Q Have you been subjected to inspections under the minimum wage laws?

A No, we have not yet, but I understand that that possibly could be, and also there could be accounting forms, reporting, all of which gives concern to me because that chews up dollars that are precious in our particular situation.

Q Now, you mentioned volunteer unpaid help. Am I correct on that?

A Yes.

Q That was in response to my last question. Is this to any substantial degree within the school?

A Well, as I mentioned, probably over a thousand hours. There are many people that are giving time, instructional aides within the classroom. We have coaches that volunteer their time; addressing, mailing, typing—just a host of things.

Q Why is this help afforded, to your knowledge?

A Well, primarily because our parents are aware that—well, they are paying tuition. Many of them are really struggling to pay. And we have indicated that the more help we can get, the more subsidy in this area, to [42] that degree we will be able to keep those tuition costs down. And so many of them are very ready to come and to volunteer their time in order to keep that tuition at a low level.

Q Is your school involved in workman's compensation?

A Yes, we are.

Q Does this present a problem to you?

A Well, it does remove the financial burden, the liability on our school right now. Thus far, it has not presented any major imposition on our program. I am a little concerned in regard to its far-reaching implications to the future; that is all I can say at this point.

Q Now, in 1974 the Congress enacted the Federal Emergency Jobs and Unemployment Assistance Act. Under that it created a program known as SUA, or Special Unemployment Assistance program.

Did your schools participate in SUA?

A No, we did not, and I am not even aware of that program, to be honest with you.

Q All right. Now Mr. Enderlin, Redwood Christian Schools is a plaintiff in this case; is that correct?

A Correct.

Q Why is Redwood Christian Schools a plaintiff in this case?

[43] A We are opposed to the federal and the state government imposing a tax on our school.

Q Can you specify in any more detail why you are opposed to this program?

A Yes, I'd like to give several reasons for that.

Q Please.

A First, I believe that it would be improper for the government to decide whether it was justified for an

employee to be dismissed from Redwood Christian School. Many of these areas would be moral/immoral issues of which, as I say, they are not qualified to govern.

It would almost seem in this area that it would be the state Department of Labor versus the word of God, because this is ultimately where we take our decision and our position for dismissing a student.

I do feel also within this same area that the Department of Labor could impose upon us the responsibility to pay the wages, the unemployment wages, for a dismissed employee, dismissed wholeheartedly on the basis of the word of God from our standpoint but obviously, in the light of the state Labor Department, wholly an unworthy reason in their eyes.

Another reason that I would like to give is that it's been said over and over again that we are not a church; [44] we are a ministry. Therefore, we are subject to pay taxes.

I just find this wholly incongruent because we are a ministry. We are a religious institution.

Just recently we received notification from the Secretary of State that confirmed what we have been saying all along: that we are religious. The Secretary of State in the new non-profit corporation reclassification has classified us as "religious" and put us into a similar classification as churches.

Another area that is very important to us would be the area of financial. Our institution, as I mentioned previously, is supported by tuition and gifts. Tuition obviously is a charge imposed upon our families. Gifts are strictly voluntary. We have limited funds and limited resources.

The state Department of Labor indicates that a teacher, if they go to the maximum of claim benefit, can receive up to $8,000 within the course of a year. To me, $8,000 is a considerable amount of money.

If you happened to have two or three of those in the course of a year, it could be catastrophic for us.

One of the things that is also imperative, along with this area of finances, is those costs, whether it is $8,000 or sixteen or whatever; those costs, those moneys [45] have got to come from somewhere. We have no other alternative but to pass that along as increased tuition to our parents that are in the school. Inflation is catching many of them in a spiral to where they are having to really sacrifice in order to meet the current tuition that we have. This would be an added burden.

Within this area of financial I am familiar with two ways that we can finance unemployment, and both of them have their problems.

One is the reimbursable method. This probably would be the one that we would elect to go on, if that decision had to be made here today. That would mean that in a given year we would have to pay exactly the claims that were put to us, which could be one teacher—$8,000, as I have already mentioned, on up.

The other way is to take the tax formula method, which is about 3 percent of total wages. Based on our budget for this next year, that would be about $30,000 that we would have to budget in our current budget coming up for this next year. $30,000 is a lot of money to add to tuition for these already overtaxed parents.

Needless to say, finances is a major, major consideration.

Another area that I would like to express is [46] that I am opposed to the government reaching into the religious community. And I think that would be in the form of a forced program of which this would be one. That would take the form of the employee being notified that if he or she was discharged, the government could ultimately decide whether that firing, dismissal was justified.

I believe this conditions that employee to certain unfavorable situations as far as we are concerned. I also feel that that puts the government into the employment relationship with a religious organization. I would be opposed to that.

Another that I feel is important is that a religious institution should not be helping to fund secular and/or government employees. And I make that statement on the basis that if we would elect to go to the tax rate unemployment fee structure of 3 percent, and if based upon our previous track record we had had no employees dismissed or fired because of unbiblical, unscriptural teaching, we could be contributing $30,000 or more per year based upon budget costs, which none of those funds are returned to us. Those would all be going into then supporting non-religious programs of that nature and would ultimately be doing so through the tuition and the gifts of the believers within our school, our community of believers.

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[83] ROUSAS JOHN RUSHDOONY,

called as a witness on behalf of Plaintiff Grace Brethren, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell your last for the record.

THE WITNESS: My name is Rousas, R-o-u-s-a-s, John, Rushdoony, R-u-s-h-d-o-o-n-y.

DIRECT EXAMINATION

BY MR. BALL:

Q What is your residence address, Dr. Rushdoony?

A I live in Vallecito, California; V, as in Victor, -a-l-l-e-c-i-t-o; P.O. Box 158.

Q Dr. Rushdoony, what is your religion?

A I am a Christian. My background is the Church of Armenia. My ministry has been Presbyterian and Anglican.

Q Now, would you please describe to the Court your professional background.

A My professional background includes missionary work among the Chinese Americans of San Francisco,

the Paiute and Shoshone Indians, work with the William Volker, V-o-l-k-e-r, Fund and Educational Foundation as an independent consultant; staff member of the Center for American Studies, and for some years now staff member and president of [84] Chalcedon, C-h-a-l-c-e-d-o-n, Foundation.

I am the author of around thirty or so books, numerous articles; have been the recipient of a couple of research grants and so on.

Q Would you describe to the Court, please, your educational background.

A My educational background is: B.A., M.A., PhD and B.D., bachelor of divinity.

Q Would you identify the scholarly books and principal articles which you have made reference to.

A Most of the books have been scholarly. One of those in the field of education or the history of the philosophy of education; it was entitled *The Messianic Character of American Education*, which traced all philosophies of education in this country from Horace Mann to the present. That is, public education.

Q When was that published, Doctor?

A I believe that was published in 1963 and has been continuously in print since then in numerous printings.

Q Have you published other scholarly books?

A Yes. Among them, for example, in the field of philosophy, *By What Standard*, *The One and the Many*, *The Word of Flux*, which is in the field of epistemology.

Then I have also written *Institutes of Biblical* [85] *Law*, which is in use in some law schools today.

I have also written a number of other works. For example, *The Foundations of Social Order*. A great many more.

Q Yes, sir. Now, Doctor, what is your principal field of scholarly endeavor?

A Although I am a member of the Society of American Church History, my primary interest has been with the history of ideas, philosophy and theology, and related areas of disciplines.

Q Are you familiar, Dr. Rushdoony, with the issues in this case?

A Yes, I am.

Q Have you read the complaint in this case?

A Yes, I have.

Q Now, the individual plaintiffs in their complaint, the various plaintiffs assert that they are of the Fundamental Christian faith. Now, as a specialist in the field that you have described, can you explain to the Court what is meant by "Fundamentalist Christian Faith"?

A Yes. It would be possible to go back, and properly so, to the Old Testament to explain it.

But the most recent aspect of the history dates from the 1890's when a group of scholars at various schools, [86] the Old Princeton and elsewhere, came together to assert in the face of the growing invasion of the churches by humanism, what they called the "fundamentals of the faith," the fundamentals of historic orthodoxy.

These papers were published in a series of five paperbacks and subsequently reprinted in one volume. They dealt with such matters as the infallibility of Scripture, the Deity of Christ, the Trinity, the atonement and so on.

As a result of those papers, a group of people—and not as an organized movement but as groups here and there all over the country—began to withdraw from the existing churches to establish independent churches. And they added to these fundamentals as their basic conviction the necessity for regeneration: to be "born again Christian."

From about 1900 to approximately 1950, Fundamentalism was in the process of church formation of separation so that the great key word in that half century in Fundamental circles was separation"; separation from the world, separation from modernists or humanistic churches

About 1950, give or take a year or two, these Fundamentalist churches then began to concern themselves

with the life of the faith. They began to recognize that the world around them was, even as the churches they had left had been. So they began with a kind of gut feeling, [82] and many of them cannot articulate their reasons too well, to recognize the need to create their own society, their own institutions. So they began to create schools and the beginning of this Christian school movement outside of the traditional parochial school groups—Catholic, Dutch or Christian reformed and the Lutheran and Seventh Day Adventist is a fourth.

The beginning of this tremendous growth, a burgeoning of this Christian school movement was approximately 1950. With it, as a part of creating the Fundamentalist parish or community, went also related activity so that you have, although the Christian school movement has been primary, the creation of homes for delinquent children, the creation of homes for the elderly, the creation of new institutions for a separated society.

Q Now Doctor, will you please tell the Court what is meant by the term "church" in Fundamental Christianity.

A The term "church" is a very interesting one and, unhappily, a confused one because of an accident in the English language. We have the word "church" or "Kirk," which comes from the Greek "Kyriakon Doma"; K-y-r-i-a-k-o-n, and then Doma is a second word, D-o-m-a, as in "domicile." It means "house of the Lord." "Kyrios," Lord.

Now, that term came into being in the early [88] centuries, after about the 5th, 4th century, approximately, when church buildings were created.

And from "Kyriakon Doma," especially from "Kyriakon," "Kirk" and "church" developed, which unhappily refer to the building or the institution.

However, in the New Testament the word which is translated into English as "church" is "ecclesia," e-c-c-l-e-s-i-a. Now, "ecclesia" we find in the Septuagint or the Greek version of the Old Testament, translated for the Hebrew of "Quhal" and "Edah."

The best way to explain it is to say that the term in the Old Testament which meant "Israel" as the covenant people of God is what is meant by "church." We find therefore in the patristic literature, and it is summarized in Bingham's *Antiquities* of the Christian Church, which is a summary of all the source materials of patristic literature, that the "church" meant, in the early church and in the New Testament, the worshipping body, or what James in his Epistle 2:2, I believe, translated into the English as "assembly," renders in the Greek as "synagogue," so that the place of worship was called the "Christian synagogue."

Then, however, the church was also a school from the very beginning, because in the Old Testament the [89] ministry was twofold: a sacrificing priesthood, and then a Levitical ministry. And Deuteronomy 33:10 specifies that the foundation of the Levites is instruction.

Well, the priesthood ended in the church because our very English word "priest" is not related to the "Cohen" of the Old Testament but is rather an abridgement, as an unabridged dictionary will tell you, of "Presbyter," or "elder."

Now, the ministry in the New Testament, both in the synagogue and in the school, was Levitical; that is, instructional. And you find that a library, a school and a church or "synagogue," as they would say, constituted the covenant community or church. It is also spoken of in the New Testament as the "Israel of God." That is, the New Israel, the New Testament.

* * * *

[96] Q Now, what is the status in fundamental Christianity of a Christian teacher in a church school, in a [97] Christian school, in relation to the church?

A He is comparable to a minister or a missionary or an evangelist.

Q Do you agree with the testimony you heard from Mr. Enderlin that their teachers are ministers in the exercise of their ministry?

A Mr. Enderlin cited I Corinthians 12:28 wherein Paul says, "The ministry of the church consists of . . .," and names, among other things, teachers.

This has been a longstanding view within the Christian church. A conspicuous example of the application of this comes from the Middle Ages when the scholars of the University of Paris corrected Pope John XXIII, who was later declared an antipope, and they spoke as the church to the supreme pontiff.

Q Then you would agree with his statement; is that correct?

A Yes.

Q Now, in the Fundamentalist view, are there any secular subjects of teaching?

A No, there are not.

Q What role, if any, do religious schools, Dr. Rushdoony, have in fundamental Christianity with respect to the Fundamentalist faith community?

[98] A Their role is very basic to the impetus that created them, which I said in the first half century of their growth was separation from modernism.

Now that doctrine of separation is being carried a step further and it is being applied in the area not only of worship but of schooling.

* * * *

[153] ERNEST L. CARTER,

called as a witness on behalf of the federal defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell your last for the record.

THE WITNESS: Ernest L. Carter, C-a-r-t-e-r.

DIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Carter, could you please indicate to the Court what your address is and your present occupation.

A 1836 Metzerott Road, Adelphi, Maryland. My present occupation is unemployment insurance specialist.

Q By whom are you employed?

A Department of Labor, Employment & Training Administration.

Q Mr. Carter, could you indicate to the Court some of your educational and work background. Why don't you [154] begin with college.

A I graduated from Wayne State University in Detroit, Michigan in 1978—I'm sorry; '58.

I taught in Detroit, Michigan for approximately five years. I then worked for the New York City Department of Social Services for one year. Beginning in 1964 to 1978 I worked for the New York State Department of Labor as a claims examiner, local office manager, senior claims examiner. For the last year—

Q Let me stop you a second. That was with the state Department of Labor in the unemployment insurance area?

A Yes, it was.

Q Go on.

A In January, 1979 I became employed with the U.S. Department of Labor, Employment and Training Administration, in my present job.

Q What is the nature of your present job, Mr. Carter?

A I am an unemployment insurance program specialist and I furnish technical assistance to the states interpreting federal law, federal requirements in unemployment insurance.

Q Which particular aspect of the unemployment [155] insurance claims process are you involved in?

A Non-monetary determinations. That is, determinations of eligibility under state law regarding discharges, refusals of employment, those elements.

Q So your employment involves the claims adjudication prior to hearing?

A Yes. It is "hearing" with a small "h." Predetermination proceedings.

Q So these are the initial determinations made at the local office.

A Yes.

Q What is your precise present assignment? What are you working on now?

A I am working on the trainer package, to train non-monetary determination adjudicators in the local office, starting next week. It is about thirty employees of state agencies. I will be attending this training course in Camp Springs, Maryland. I am conducting the course.

Q What will you be training these people in?

A Fact finding, decision making, interviewing techniques, training techniques and then the issues: Voluntary leaving, misconduct, refusal, and able and available for work.

Q Let me ask you, Mr. Carter: Are you familiar [156] generally with the issues surrounding the coverage of elementary and secondary school employees under the 1976 amendments to FUTA?

A Yes.

MR. SHEINFELD: Your Honor, I would request at this time that Mr. Carter be accepted as an expert witness on the issues of the requirements of federal law with respect to initial determinations under the Federal Unemployment Tax Act.

THE COURT: Do you have any objection to that, Mr. Ball, Mr. Daucher?

MR. BALL: Yes. Objection, your Honor. As I understand what is needed for qualification of an expert witness, it is far more than what has been shown in the case of this witness. He has, obviously, a routine familiarity with a federal job which he holds. But whether that is expert testimony I would very seriously doubt.

He shows a relatively short career in this present employment. There is nothing that indicates any specialized competence, any kind of publication, anything of the kind that would show that he has an unusual degree of information that would qualify him as an expert before this Court.

MR. SHEINFELD: Can I respond to that, your [157] Honor?

THE COURT: Just a minute.

MR. DAUCHER: I too believe it is early to qualify the witness as an expert. I think I know what the witness is going to testify regarding as an expert, and I think there are other questions that have to be answered before he can testify as an expert on those areas. I don't want to suggest those questions to the federal government, other than to say that there's been no showing at the present time regarding any experience that this witness has had in the area that we are concerned with here.

MR. BALL: Your Honor, if I may add one thing. Furthermore, he is an employee of the defendant in this case.

THE COURT: Well, that goes to his bias. I don't see any reason why he can't be an expert but I think you have to ask him some further questions.

BY MR. SHEINFELD:

Q In the course of developing your training program, has it been necessary for you to become familiar with the issues involving the adjudication of claims based on discharges for misconduct?

A Yes.

Q How have you become familiar with the adjudication [158] of such claims?

A First, I have approximately fourteen years in the State of New York, either supervising the adjudication of such claims or evaluating the correctness of these determinations in the local office.

THE COURT: What kind of training did you have for that job in New York?

THE WITNESS: I had originally a claims adjudicator's training by the State of New York.

THE COURT: What does that consist of?

THE WITNESS: That consisted of classroom training, I would say about three weeks of classroom training, and then on-the-job training for about six months.

THE COURT: Go on with the questions.

BY MR. SHEINFELD:

Q After you left the State of New York after fourteen years of examining and adjudicating claims, what have you done in your employment with the Department of Labor in this regard?

A Well, in making a course I had to set up hypothetical separation cases, role playing. First I had to establish what are the elements that you must penetrate in each discharge for misconduct. And generally there are four elements. There is the claimant's act and its effect [159] upon the employer; what the condition of employment or work rules were; the employer's efforts to prevent or control the act or actions, and it can be an omission also; and finally, the claimant's efforts to control or prevent the act or omission that causes discharge.

THE COURT: Who trained you in your present job?

THE WITNESS: In my present job?

THE COURT: Yes.

THE WITNESS: My supervisor, Mr. Ed Curley.

THE COURT: So when you first came to the department, what kind of training were you given?

THE WITNESS: It was on-the-job training that I was given.

THE COURT: All right. Go on.

BY MR. SHEINFELD:

Q During your career, both with the state and federal governments, can you estimate in any way how many claims you have examined which raise the issue of discharge for misconduct?

A Well, it would have to be hundreds. It is hard. If you are a working examiner, you would interview about

fourteen people a day on issues, and maybe ten of those would be separation issues.

Q It was your job to make determinations as to [160] whether those discharges were for misconduct and the circumstances under which those discharges took place?

A Yes, under Article 18 of the New York State labor law; that is the unemployment insurance law.

Q Let me get into a slightly other area for a second. What is the relationship between your office and your operation, and the operation of the state unemployment insurance agency, such as the State of California's?

A It is a federal-state program and the secretaries of labor have standards in terms of determinations and standards in terms of notice determinations, so it is a cooperative program, the unemployment insurance is. The states are required to administer the unemployment insurance programs to assure a payment of benefits when due, and so the "when due" means correctly under state law and also in terms of timeliness.

So there is the fairness in terms of how the determinations are arrived at; there are standards for that. There are timeliness standards in terms of how long it takes to make a determination, and there are accuracy standards.

Q So it is the job of your office to ensure that the state agencies comply with the federal standards in those areas?

A Yes.

[161] Q Is the objective of your training program to set forth to the state agencies precisely what the federal standards are in these areas?

A That is part of the training, yes.

MR. SHEINFELD: Your Honor, if I could again make my motion and modify it only slightly: To the extent that we present Mr. Carter and the next witness to establish what the Department of Labor believes is required under federal law to adjudicate claims under

FUTA, we believe that is a relevant issue in the case since the plaintiffs are seeking to enjoin the application of the federal statute by the federal defendants.

We believe that Mr. Carter is an expert on what the federal standards are and what is required.

THE COURT: No, he is an expert. He might be an expert or he might be qualified to testify as to what interpretation the department puts on a particular matter, but we know what that is already, don't we?

MR. SHEINFELD: But Mr. Carter's expertise extends beyond that to exactly how the Department of Labor believes specific claims should be adjudicated and how those adjudications—

THE COURT: Not how the Department of Labor believes it but how they do adjudicate; isn't that what he [162] is going to testify to?

MR. SHEINFELD: Yes, your Honor: how these adjudications—

THE COURT: How they do adjudicate.

MR. SHEINFELD: Absolutely, your Honor.

THE COURT: All right.

MR. DAUCHER: Your Honor, I would like to take the witness on voir dire for a moment.

THE COURT: Yes.

MR. DAUCHER: I would like to ask that Mr. Streett be excluded from the courtroom while that takes place.

THE COURT: Fine.

Mr. Streett, will you go outside.

(Mr. Streett leaves the courtroom.)

VOIR DIRE EXAMINATION

BY MR. DAUCHER:

Q Mr. Carter, would you explain to me the meaning of "hearing" with a small "h," and "Hearing" with a large "H" in connection with the unemployment insurance claims determination process.

A "Hearing" with a small "h" is a predetermination process in the local office. The claimant and the em-

ployer are not permitted to cross-examine each other. It is a [163] fact-finding process where the interviewer or claims adjudicator attempts to elicit information from each, the employer and the claimant, to make a determination under the law.

The employer is not necessarily required to be at this predetermination proceeding but he has an opportunity to appear at that proceeding.

Q Are any rules of evidence applied in such a hearing?

A You mean formal rules of evidence as in a law court? No, sir.

Q What was the extent of your participation in what you call "predetermination hearings," hearings with a small "h"? Do you understand my question?

A Yes, I do. For seven years I conducted such hearings. Then I became a senior claims examiner and I supervised ten to twelve other adjudicators who made and conducted these hearings.

Then as a manager for two years I was also responsible for the quality of the work out of the local office which also involved making these determinations.

THE COURT: That is in New York?

THE WITNESS: Yes, it is in New York.

[164] BY MR. DAUCHER:

Q Seven years where you conducted the hearings yourself? How many years did you supervise others conducting them?

A Another seven years.

Q Then you say two years you were a manager?

A Yes, I was responsible for the management of the local office.

Q What is a "Hearing" with a large "H" in the unemployment insurance context?

A A hearing with a large "H" is a hearing in which the claimant and employer may bring counsel. Testi-

mony is taken under oath. It is a more formal proceeding.

The claimant has the right to cross-examine the employer and his witnesses, and vice-versa.

Q Do the rules of evidence apply?

A Not the same rules of evidence. Administrative rules of evidence would apply; they are not the same as criminal rules of evidence.

Q During the time you were with the State of New York did you have any experience with hearings of the large "H" variety?

A Yes. Oftentimes when there was a controversy about what local office procedure was or what someone had [165] been advised, they would require a local office person to come and testify at such a hearing.

Q Did you ever conduct such a hearing yourself?

A No, I did not, sir.

Q Going back to the hearings of the small "h" variety, the informal meetings where the employee was normally present, the employer could be present at the predetermination hearing, during the seven years that you conducted these hearings did you ever conduct one of these hearings regarding a religious secondary, elementary school?

A No, sir.

MR. DAUCHER: No further questions.

THE COURT: All right.

Mr. Sheinfeld.

MR. SHEINFELD: As I indicated, your Honor, it is our intention to offer Mr. Carter's testimony on the question of the nature of the federal standards for the adjudication of hearings with a small "h."

We do have Mr. Streett who will testify in the same regard to the hearings with the big "H."

THE COURT: All right. Yes.

MR. DAUCHER: To the extent that Mr. Carter's testimony is confined to hearings with a small "h," and to the extent that Mr. Carter's testimony is confined to

[166] general standards and not specifically to religious elementary and secondary schools, and the process which might be undertaken in those schools, we have no objection to the testimony as expert testimony.

However, I think we would have an objection as to the relevance of such testimony if it didn't pertain to what standards would be applied in a hearing regarding religious elementary and secondary schools.

THE COURT: Well, Mr. Daucher, I will let the witness testify and we will see how these questions come out.

If I understand his testimony thus far, he has not been ever involved in a hearing regarding a religious school.

Is that right?

THE WITNESS: No, you are right about that; yes.

THE COURT: All right.

MR. SHEINFELD: Your Honor, there was no coverage of these schools at the time that he was employed, so—

THE COURT: I understand, I understand.

Go ahead. It depends somewhat on the way you ask these questions. Go ahead.

MR. SHEINFELD: Well, your Honor, what I intend to do—

[167] THE COURT: Don't tell me what you intend to do; do it.

MR. SHEINFELD: Just do it? Okay.

DIRECT EXAMINATION (Resumed)

BY MR. SHEINFELD:

Q Mr. Carter, let me pose to you a hypothetical question involving a set of facts and ask you based on your background and experience how you believe that case should be adjudicated under the federal standards.

I use as an example a hypothetical that was posed yesterday by counsel for the plaintiffs. If there is a teacher in that school and that school believes and maintains as a tenet that the Bible is the direct and absolute word of

God, and if that teacher, who happens to teach mathematics, in the course of his instruction tells his students that the Bible is not the direct word of God and that teacher is subsequently discharged, in your opinion can the state agency make an initial determination of eligibility without examining the correctness or sincerity of the church's belief in the source of the Bible?

MR. DAUCHER: We will object to the question on the grounds previously stated: that the witness has no expertise with respect to whether or not such a determination [168] can be made without making a determination of religious doctrine.

MR. BALL: Excuse me, your Honor. We would object to the question on the basis of the fact that it was completely unclear as to what is meant. The question, as I understand it, is: Can the hearing examiner make a determination.

THE COURT: I think you are correct about that. That question is not a good question.

Will you reframe it, please.

BY MR. SHEINFELD:

Q Mr. Carter, do you remember the hypothetical as I posed it?

A Yes.

Q Let me ask then the question—

THE COURT: Let me remind you of what the hypothetical is.

You have a teacher in a religious school. One of the tenets of the school and the teaching of the school is that the Bible is the word of God. The teacher is a math teacher. The teacher in the course of teaching the math class tells the students that the Bible is not the word of God and is discharged for that.

Do you have that in mind?

[169] THE WITNESS: Yes, I have that in mind.

THE COURT: All right.

BY MR. SHEINFELD:

Q Mr. Carter, under the appropriate federal standards, should that discharge be adjudicated without reference to the school's belief in the nature of the Bible?

A In order—

MR. BALL: Objection again, your Honor. That question is not clear. "Adjudicated without reference to the school's belief"—this was not a part of any hypothetical that I posed.

THE COURT: All right. Let's ask the question differently.

How should that matter be adjudicated in a hearing, small "h" hearing, in your opinion?

THE WITNESS: First, if there was a violation of a rule or a standard of conduct that the employer had a right to expect from an employee, was this a condition of his hire when he was hired, that he not undermine the employer or make acts that were, commit acts that were detrimental to the employer's interests.

If there was that understanding and it was part of the contract of hire that this was a religious school and that then if he knowingly made a statement harmful to [170] the employer's interests, it would be adjudicated—it could be adjudicated, yes.

BY MR. SHEINFELD:

Q Would that discharge be considered a discharge for misconduct?

A Yes. If he willfully violated his contract of hire and committed an act harmful to the employer's interests, it would be construed as misconduct; in keeping with state law, of course.

Q Does that contract of hire have to be in writing?

A No, that can be an oral contract of hire.

Q And the conditions of employment that might subsequently result in a discharge for misconduct could also be oral?

A Yes.

Q Let me pose to you a second hypothetical.

THE COURT: Excuse me just a minute. What you are saying is that you, in your small "h" hearing, would first ascertain whether there was an understanding on the part of the employee that as part of his contract of hire he was not to say to the students that the Bible is not the word of God. You would be looking to see if he understood that as part of the conditions of hire?

THE WITNESS: Yes, that would be so. That would [171] be so.

THE COURT: All right. Go on.

BY MR. SHEINFELD:

Q I would like to pose to you, Mr. Carter, another hypothetical that was raised yesterday. Let's keep with the same teacher, but this time the teacher is discharged because it was determined that he was drinking off the job, contrary to the rules and regulations of this school.

How should such a discharge be adjudicated?

MR. BALL: Objection, your Honor. The hypothetical to which Mr. Sheinfeld refers, which I presented yesterday, did not specify rules and regulations. It merely said that the person was observed having that sort of conduct.

THE COURT: You will have to change it. That is exactly what Mr. Ball did say.

BY MR. SHEINFELD:

Q Mr. Carter, in the case of a teacher who was discharged from his employment for drinking, how would such a claim be adjudicated?

THE COURT: Mr. Sheinfeld, I don't want to interrupt you again. The hypothetical or the situation that was put was, "drinking in public, observed drinking in public."

[172] BY MR. SHEINFELD:

Q Mr. Carter, in the case of a teacher in a church-related school who was discharged when it was observed that he was drinking in public, how should that type

of claim be adjudicated, based on the federal standards as you understand them?

A First, the claimant—the local office would be obliged to allow the claimant to give his version of the incident. I don't know whether you are saying this "observe" as a fact or not. But if this is a fact, again, although it is not in connection with employment, it would depend again on the nature of the employer's business.

Usually acts of misconduct happen in conjunction with employment. But if the employer's business is such that an act away from the job reflected upon the employer's reputation, then that could be construed as an act of misconduct.

MR. DAUCHER: Excuse me a moment, your Honor. May I ask that the witness' answer be read back so that I could take it down?

THE COURT: Yes, yes.

(Record read.)

BY MR. SHEINFELD:

Q Mr. Carter, could you expand for a moment on [173] what you mean by "if it reflects on the employer's business."

A I didn't mean any pejorative reference to the church as a business, but a brokerage house, for example, or bank may have standards of conduct for employees that would not be expected for someone who had public contact; for example, who repaired cars.

So that if an employee of a brokerage house in the lobby of the place where he worked was arrested for an act not in connection with employment—taking bets or possessing drugs—although it wasn't in connection with employment, the standards of conduct and the character requirements for certain jobs are such that that would reflect upon the employer.

In this particular case I am—the hypothetical I am giving you, it may result in a revocation of a bond and, of course, the employer couldn't retain the employee if he wasn't bonded any longer.

Q Let me ask you one final question, Mr. Carter.

During the period that you were employed by the State of New York in the years between 1974 and 1976, were you aware of any claims that were filed under the Supplemental Unemployment Assistance Program?

A Yes, I was.

[174] Q Were you personally aware of any claims filed under that program by employees of church-affiliated elementary or secondary schools?

A Yes.

MR. SHEINFELD: I have no further questions, your Honor.

THE COURT: All right.

Now, Mr. Ball.

CROSS-EXAMINATION

BY MR. BALL:

Q Mr. Carter, have you ever been employed by a private school?

A No, sir.

Q Have you ever been employed by a religious school?

A No, sir.

Q Are you familiar with constitutional law?

A No, sir. I am not an expert on Constitution. I am familiar with constitutional law, yes.

Q Are you an attorney?

A No, I am not.

Q Have you any specialized qualification in the field of religion?

[175] A No, I have not.

Q You are instructing unemployment compensation agents from the states in standards for determination of misconduct?

A Yes. Sir, may I extend that answer?

Q Certainly.

A There are general guidelines and a general format you follow in terms of eliciting facts or evidence to make a determination. Each state law has its own; every state,

the laws are not uniform. These are state laws that are administered. But there are general guidelines for proceeding when the issue is misconduct or voluntary leaving.

But finally, state law is applied to the facts to make a decision.

Q Are there any particular guidelines with respect to misconduct in situations arising in religious schools?

A I don't approach that or have any examples in my training course regarding religious schools.

Q You are not aware of any consideration that is given to those situations?

A No, not in my training.

Q Now, Mr. Sheinfeld asked you a hypothetical question regarding the teacher who teaches that the Bible [176] is not the word of God. You recall what that is, I am sure.

A Yes.

Q Did I understand correctly that the hearing examiner would then examine into the contract, oral or written, between the employer and the employee?

A Yes.

Q Now, suppose that the contract is a statement of faith by a religious school to which the employee pledges fidelity. Do you follow that?

A I follow that.

Q Now, would the hearing examiner then be privileged to examine that statement of faith to see if, indeed, the contract had been breached?

A I don't know how you mean that question. I'm sorry.

Q You don't think you can answer that question?

A I don't know what you mean by the question.

THE COURT: He doesn't understand it.

BY MR. BALL:

Q I beg your pardon, Mr. Carter. Let us suppose that this teacher entered into an understanding with the

school that she would observe a document called a Statement of Faith, and that the school discharges her on the ground that, so the school alleges, she breached the Statement of [177] Faith; taught something contrary to it.

Now, in this small "h" hearing that takes place or in any later hearings, would the hearing examiner examine what the agreement was between the two, the employer and the employee?

A He would. He first would obtain whether there was any disagreeemnt over whether this agreement was violated because you would have the claimant on one hand probably making one contention and the employer making another.

THE COURT: Well, make an assumption that they do disagree.

BY MR. BALL:

Q Yes, make the assumption now that they disagree.

A Then it would be a matter of asking the employer—You said there was a signed document or something about faith?

Q I said that the school has a Statement of Faith, a religious school has a Statement of Faith—

A Right.

Q —to which the employee had pledged fidelity—

A Right.

Q —that he would observe the Statement of Faith.

A And now the hypothetical is that the claimant [178] disagrees; they say they observed the Statement of Faith.

Q This is one hypothetical, one which her Honor suggested.

A Right.

Q That is, that the employer says, "You breached it," and the employee says, "No, I didn't."

What does the hearing examiner do in that case?

A Well, he has to weigh the evidence from both parties and decide in favor of one or the other.

Q All right. Now, how will he weigh that evidence? Does he look at the Statement of Faith? Is that evidence to be looked at?

A If both parties agree there was such a Statement of Faith.

Q Well, we have that as a given now.

A Right.

Q We all agree that there is a Statement of Faith. That was a fact I gave you.

THE COURT: Yes. Let's assume that the Statement of Faith is in writing and it is right there and the teacher has signed it when the teacher started the employment.

THE WITNESS: The person says, "I didn't break it," then the burden of proof or risk of nonpersuasion would be with the employer to show that this person did that, [179] was in violation of this article of faith or their contract.

BY MR. BALL:

Q Why don't you just answer my question, which is: would the Statement of Faith then be examined by the hearing examiner?

A Yes, that would be part of it.

Q Right. Now, having done that, what else takes place in this process of determining whether there was misconduct?

A This is the only issue: that this person violated the contract of hire by breaking this faith?

Q Right.

A Then he or she would have to decide whether this happened or not because you have contradictory statements.

Q Yes. You mean the hearing examiner would have to decide, right?

A Yes.

Q That "he or she" is the hearing examiner, is that what you are talking about?

A Right. You have one statement, and a statement in rebuttal.

Q Yes.

A Then you would ask again to the employer, "Why do you believe or what do you offer to say that she did [180] break this?"

Q "Why do you believe" what?

A "Why do you believe she violated the contract of hire? What act did she commit?"

Q So then you go into the question of whether the employer was correct in stating that this individual breached a doctrine or provision of a statement of faith, right?

A Yes. If the employer's statement was that, you would have to determine whether or not there was an act that broke their contract of hire, or misconduct.

Q Fine. Now, let me pose another question to you, if I may, another case.

Let's suppose that this same teacher in this religious school begins to appear to the employer, the church, the religious school, as lacking in religious fervor. Do you know what I mean by "religious fervor"? High interest, desire to evangelize, be zealous—all right? They begin to—

A I don't—

Q You don't understand what I mean by "religious fervor"? Well, enthusiasm.

A All right.

Q A high degree of interest.

[181] A Yes.

Q And this, in the case of religion, a desire to communicate that very actively to children.

THE COURT: Let me ask the witness this question: Do you know what Mr. Ball is talking about when he uses the word "evangelistic"? Do you understand that word?

THE WITNESS: I think it means someone who tries to proselytize, someone with missionary zeal, someone who tries to—

THE COURT: All right, that is fine.

THE WITNESS: —promote their beliefs.

BY MR. BALL:

Q That is fine, Mr. Carter. Now, the school authorities come to be of the belief that this individual no longer has that religious fervor or enthusiasm or desire to proselytize, and eventually they decide that is very important to them and they fire the teacher on that ground. Suppose now this teacher has been a math teacher, as Mr. Sheinfeld said, has been keeping class punctually, working well with students in terms of the professional teaching of mathematics.

The teacher now claims unemployment compensation and the church says she's guilty of misconduct.

[182] Now, this comes before your small "h" or large "H" hearing situation. What does the hearing examiner do? How does the hearing examiner proceed in that case?

A I think that an element of misconduct which I didn't restate was the willfulness and whether or not the act or acts are within a person's control.

Q Let's suppose, if I may, then, that the act or acts—strike that. This is not a situation, Mr. Carter, in which there is necessarily any element of willfulness. It hasn't been specified; it is perhaps a lack of will.

A Well, an ordinary employer-employee relationship, if I worked for you, if my conduct was not meeting your standards, you would be obliged to inform me: "Mr. Carter, I'd like for you to be more friendly when you are dealing with our customers."

And if your request is a reasonable one, as I said, that element of the employer trying to prevent or control this act, if he had spoken to this person about this—that we would go into.

You are asking what things would we consider. We would consider that.

Q No, I am asking you—well, let me ask you another question because you have suggested it.

Does the Federal Unemployment Tax Act provide [183] that the employer has to go to the employee when he sees everything he is worried about in reference to the employee and say, "I am warning you: Do a better job."

Is that in the Act anywhere?

A That's not in the Act.

Q Thank you. All right. Now let's come back to my example.

This individual has been fired from the religious school because of lack of religious zeal dealing with the students. This teacher is also provedly a competent teacher of math. This person claims unemployment compensation, and the matter comes into a hearing.

A Yes.

Q My question to you is: How will this be disposed of, assuming just those facts?

A First, I would have great difficulty measuring "zeal" and what that meant.

Q You would have great difficulty in measuring "zeal"?

A And what that meant.

Q Yes. So what would you do?

A Then the employer also would be—I would ask what harm and what efforts had been made to correct this. And if no harm accrued to the employer and if this was not [184] an act within the claimant's control, then it would not be misconduct.

Q You say if no harm accrued to the employer, who would judge of that harm?

A Well, the employer would. Since he discharged, he is the moving party in this, the employer.

Q He says he is harmed?

A Yes, the employer would be obliged to show there is harm.

Q Who would judge? Come back to my question, please. Who would judge whether there was harm?

A The claims examiner then would determine whether—

Q The claims examiner would make that determination?

A Yes.

Q Thank you. Now, let me ask you this:

Suppose a school operated by a church refused to comply with the Federal Unemployment Tax Act based upon its claim that it is organized primarily for religious purposes and it is operated, supervised, controlled or principally supported by a church.

Now, do you consider that any employee of a school, of that school, would be covered?

MR. SHEINFELD: I object to that question, your Honor. That is outside the scope of the direct and we do [185] not purport him to be an expert in that matter.

THE COURT: Sustained.

MR. BALL: Your Honor, if I may say, this gentleman is purported to be a specialist in discharges, initial determinations, et cetera, and an old hand in unemployment compensation. It seems to me that he should be competent to answer this question eevn if he is not an expert in that particular area.

THE COURT: Let's hear the question.

(Question read.)

THE COURT: That is outside the scope. Sustained.

MR. BALL: Just one moment, while you are looking at your notes, I want to ask the witness a question.

In the situation where an employee works, is a teacher at a religious school—and you will remember this hypothetical—and the teacher is observed drinking in public —the teacher is not drunk; the teacher is drinking in public, in a public place in which liquor can be sold legally, a bar—and the teacher is in the bar having a drink, not intoxicated but having a drink.

Now the church school, the religious school discharges the employee. You now have a proceeding before you and there is no question that the teacher was having a [186] drink and there is no question that the school

takes a position that drinking is a bad thing. They teach the students that drinking is a bad thing and should not be engaged in.

Now describe to the Court, if you will, what would take place in that hearing. Also assume that drinking in a bar, all the aspects of the drinking were legal.

THE WITNESS: Yes. We would first ask—I have as a fact that he was drinking?

THE COURT: Yes, and not drunk, not intoxicated. He was drinking in a legal place and all aspects of behavior legally.

THE WITNESS: Well, I would ask if he understood that this was in violation of his contract of hire.

I would ask if his employer had directly told him not to engage in this conduct. Those would be questions.

The question of whether or not he is an alcoholic, because that could be treated as an illness.

THE COURT: No, no, no.

THE WITNESS: Okay.

THE COURT: This is a perfectly normal individual having one drink in a legal establishment.

THE WITNESS: So I have asked you whether he knew that this was contrary to the employer's interests. [187] THE COURT: That is the question that the hearing examiner would be asking; is that right?

THE WITNESS: Right.

THE COURT: Now let's assume that the teacher answers the question by saying, "Yes, I knew that it was one of the tenets of the school that teachers should not drink because the teachers were teaching the students that they should not drink."

THE WITNESS: Well, I think that if you are asking me my opinion as to whether or not that was misconduct,—

THE COURT: I am.

THE WITNESS: —I would say yes, that was misconduct in connection with employment. Although it did not happen on the job and directly with his duties, the

nature of the employer's business is such, and such of a sensitive nature that it would require different character standards and performance away from the job.

Another example of that would be a case—I am quoting a case now where a person was a guard in a bank in a small town and the bank president asked the security guard not to stop in the bar before or after work because it reflected on the bank. The employee persisted in stopping in the bar and was discharged. It was upheld, his discharge [188] was held to be misconduct and it was a precedent decision in New York, because the way the law reads, it is in connection with employment. And although his drinking was away from the job, it reflected on the employer and, therefore, was held to be misconduct.

THE COURT: Go on, Mr. Ball.

BY MR. BALL:

Q Suppose, Mr. Carter, that the conduct was a kind of conduct which does not reflect on the reputation of the employer.

A I didn't hear that whole question; I'm sorry.

Q That is all right, sir.

Suppose the conduct is conduct which would not be thought by the public to reflect on the reputation of the employer, but which is nevertheless severely discountenanced by the church.

Let's suppose, for example—or, pardon me. You can answer that if you care to.

A An employer and an employee may enter in a contract and the hours of work may be set at some peculiar times that are not ordinary hours of work. If the employee then does not come in at that time and is discharged for that, then he's violated the contract of hire. Supposing the starting time is 3:00 A.M. If this does harm to the [189] employer and that is their contract of hire, then that discharge would be for misconduct in the facts I am giving you.

Q I was taking Judge Pfaelzer's question into one further example of conduct relating to morality. Her Honor mentioned the case of the person who was drinking.

Let's suppose we have a Roman Catholic school and it teaches that contraception is wrong. But contraception, as we know, is very widely practiced and is probably not generally condemned in the community.

This teacher in the Roman Catholic school advocates the use of contraceptives and is fired for that reason. This misconduct is not misconduct which in any way is harmful to the reputation of the school and the community. What would the hearing examiner do with that question?

A In a Catholic school? You are saying this is a Catholic school?

Q Yes.

A I would say that that would be harmful. If the church doctrine is one thing and the person undermines his employer or takes a stance to the students that is contrary to what he has been—you know, what he is told that he should not promote, then I would think that act would be harmful to the employer's interests.

[190] Q Well, let me ask you this—

A Although not harmful to the public interest.

Q Yes. When you are instructing the people who come to be instructed on eligibility, do you give them any instruction at all as to how to deal with the situation where someone claims to be a minister in the exercise of his ministry in a religious school?

MR. SHEINFELD: I object, your Honor.

THE COURT: Read the question back.

(Question read.)

THE COURT: What is the objection?

MR. SHEINFELD: Your Honor, I believe that is also outside the scope of the direct and I don't believe

that we purported to show that Mr. Carter was an expert on that subject matter.

THE COURT: Well, let's see if he can answer the question.

BY MR. BALL:

Q Do you understand the purport of my question is that the school is claiming that this employee is not covered because of being a commissioned minister in the exercise of his ministry?

A And the question is?

Q And the question is: Do you determine, does this [191] hearing examiner determine whether or not this individual is noncovered or excluded?

A Well, the training I give doesn't pertain to the issue of entitlement or coverage. The people that I am training are dealing with people who are already entitled and covered.

So my training does not deal with that question of entitlement or coverage.

THE COURT: So that is outside the scope of his expertise anyway.

MR. BALL: I beg your pardon, your Honor?

THE COURT: That is outside the scope of his expertise, and that is why you asked the question. You have the answer now.

MR. BALL: I have no further questions, your Honor.

THE COURT: Mr. Daucher.

CROSS-EXAMINATION

BY MR. DAUCHER:

Q Mr. Carter, are you able to estimate percent of disputed unemployment insurance cases in which the issue or one of the issues is misconduct?

A I could give you roughly the separation [192] questions; that is, either voluntary leaving or misconduct. Those are separation issues.

I cannot break it down. About 40 percent of the cases involve separations.

Q Just so that we are clear, the word "separations" to me must come up in all unemployment insurance cases. You have to be separated from your employment to be eligible; is that right?

A I use jargon; I'm sorry. By "separation issues," I mean those where the person voluntarily left his job and those where a person was discharged. I didn't mean separations which are a layoff because of lack of work or a company relocating, or reasons which do not involve an issue which has to be adjudicated.

Q Is your testimony that 40 percent of the disputed cases involve separation issues or 40 percent of all of the unemployment cases involve separation issues?

A I think it is 40 percent of all the issues that are adjudicated out of, for example, ten million issues in 1979. There were ten million decisions made in the local offices. And it is my belief that about 40 percent of those pertain to voluntary leaving or misconduct; I can't break it down any further than that.

Q You say there were ten million decisions made in [193] 1979? I take it under that decision is made each time a person applies for unemployment insurance; is that right?

A Yes, if there is an issue when he applies. If he is laid off for lack of work, you can have multiple layoffs and each time there is no issue to be decided.

But you could quit jobs several times, different jobs several times, be reemployed and quit, and each time file a claim and it would have to be adjudicated.

Q I am not sure that I understand your answer.

THE COURT: Excuse me. It is 40 percent of the cases adjudicated; is that right?

THE WITNESS: Yes, of the total issues we decide. Maybe I can explain that.

There were other issues than the separation issues. There is refusal of suitable work; there is able and

available, or reporting requirements that are also adjudicated.

So there are issues other than—

THE COURT: Excuse me. I understand that.

THE WITNESS: Yes.

THE COURT: You are talking about 40 percent of adjudicated-issue situations are issue situations that deal with separation?

THE WITNESS: Right.

[194] THE COURT: Are you saying that 40 percent of ten million—

THE WITNESS: Yes.

THE COURT: There are ten million cases adjudicated in the country?

THE WITNESS: Yes, in fiscal 1979.

THE COURT: All right.

BY MR. DAUCHER:

Q Let me go back because I am not sure I understand the answer.

Does an adjudication take place each time someone applies for unemployment insurance?

A Not unless there is an issue, and an issue may be whether the person is ready, willing and able to work, whether they refused an offer of suitable work, and whether they quit, or whether they were discharged for misconduct.

Q In the first hypothetical that was posed by Mr. Ball regarding the math teacher who taught that the Bible was not the infallible word of God, in describing how that case would be adjudicated, you said that you would look among other things to whether the work rule of the employer or a condition of hire was that the teacher would not teach that the Bible is not the absolute word of God. Does that condition of hire have to be an express condition, [195] Mr. Carter?

A Some acts are acts that you know or should know as an employee. For instance, an employer doesn't have to tell an employee he has to come to work; that is sort

of an accepted condition of employment that you must report for work.

Q So there are express work rules and implied work rules?

A Yes.

Q Do the implied work rules depend upon the nature of the organization that is the employer?

A I understand the question. I am thinking of the answer.

(Brief pause.)

Yes, I would think that some implied work rules would involve the nature of the employer's business.

THE COURT: We will take the morning recess.

(Recess taken.)

THE COURT: Mr. Carter, you will remember you are still under oath.

THE WITNESS: Yes, I do.

THE COURT: All right.

BY MR. DAUCHER:

Q Mr. Carter, just before the break you testified [196] that implied work rules would vary by type of employer.

Do you recall that?

A Yes, I did—I do; sorry.

Q I take it the concept of implied work rules has something to do with your answer or your response to one of Mr. Ball's questions to the effect that if the employer's business is such that an act away from the job reflected on the employer's reputation, then that could be construed as an act of misconduct; is that right?

A Yes, I did say that; yes.

Q Now, I take it, since different churches have different doctrines, that the implied work rules for one church might be different from the implied work rules for another church; is that right?

MR. SHEINFELD: I object, your Honor. Mr. Carter testified he doesn't know anything about churches.

THE COURT: All right.

Read the question back.

(Question read.)

THE COURT: Can you answer that question?

THE WITNESS: Well, he gave an example of contraception being promoted by a teacher, and I understand that that is a principle of the Catholic Church.

Before I go any further, though, I am not really [197] an expert on church doctrine. But the example he gave was contraception, and I don't know if there is any church that supports contraception.

So that in Church B where there is not a matter of principle or doctrine, then a statement about contraception would not be harmful to the employer's interests; where in Church A, the Catholic Church, which was the example, it was.

Have I answered your question?

BY MR. DAUCHER:

Q Yes, I believe you did. That means, does it not, that in order to determine what implied work might be applicable in a particular case involving a discharged employee of a church, that the hearing examiner would become familiar with what the doctrine of that church was, would he not?

A Oh, anytime an employer says he broke a rule, you'd have to know what the rule was. You couldn't adjudicate the case without knowing what the rule was.

Q But in this case we are not talking about an express work rule of the employer; we are talking about an implied work rule of the employer. We are talking about a work rule that would be implied based upon the doctrine of the church involved.

Now, in the case of an implied work rule of a [198] church that came into issue in connection with the dis-

charge of a church employee, the hearing examiner would have to become familiar with what the doctrine of the church was, would he not?

A He would have to know what the person did, what act led to his discharge.

Q But he would have to know also whether that act violated an implied work rule of the church, would he not?

A Well, the employer, the burden of proof again is on the employer to show that there was cause for the discharge and to explain why this person was discharged.

Q Let's go back a step. You have already testified that implied work rules would differ from one church to another, such as in the instance of contraception. One church may have as a part of its doctrine that contraception is improper; another church may not have that as a part of its doctrine. Therefore, an employee who was discharged from Church No. 1 which had as a part of its doctrine that contraception was improper and an employee was discharged for advocating contraception, the hearing examiner would have to know whether the doctrine of Church No. 1, under the doctrine of Church No. 1 contraception was proper or improper, would he not?

A Again, the only way I can answer that is to say: [199] the employer, being the moving party, has the burden of proof or the risk of nonpersuasion so that when he says, "I fired him for Act A," he then has to show, explain what Act A is and what the impact of Act A on him was and what the conditions of employment were.

Q So it would be up to the employer to show that it was, and in this case we are talking about a church, it would be up to the church to show that part of its doctrine was that contraception was improper, would it not?

A Right, if that was the reason for the discharge.

THE COURT: Mr. Carter, does the hearing examiner ever get into the question of whether a particular implied work rule is reasonable or unreasonable?

THE WITNESS: Yes, and whether it is enforced or not.

THE COURT: So that one of the questions the hearing examiner will take into consideration is whether it was a reasonable implied work rule?

THE WITNESS: Right, and whether it was enforced and whether the employer had taken steps to remind the employee that there is such a rule or such conduct may lead to your discharge. Those are the kinds of elements the interviewer would ask or the adjudicator would ask.

THE COURT: Go on, Mr. Daucher.

[200] BY MR. DAUCHER:

Q In the hypothetical question raised by her Honor, the example was of a person in a bar drinking publicly; not an alcoholic, no particular reference to any impact on the employer other than the fact that the employer was a church and the doctrine of that church forbade drinking.

In the example given by her Honor, to which you responded, I believe, an additional fact was that the employee agreed with the doctrine of the church that forbade drinking—Do you recall that?

A Yes.

Q Let's change the example only to this degree: Suppose the employee disagreed; said, "No, the doctrine of this church does not forbid drinking."

The employer, the church, says, "Yes, the doctrine of this church does forbid drinking."

Would the hearing examiner listen to evidence regarding whether or not the doctrine of the church forbade drinking in that case.

A Yes.

Q Thank you. I want to give you a new hypothetical, a different subject.

I represent the Lutheran Church, Missouri Synod. The Lutheran Church, Missouri Synod maintains, it's been [201] agreed in this action that they maintain synodical colleges for the purposes of training people to, among other things, become teachers in their school.

It's also been agreed in this action that the schools operated by member congregations of the Lutheran Church, Missouri Synod prefer to have teachers in their schools who have graduated from one of the synodical colleges.

Now let's suppose that we are dealing with one particular school in Los Angeles. This particular school in Los Angeles has fifteen teachers. Ideally they'd like each of the fifteen teachers to be graduates of synodical colleges, but in the year 1979 they can only find thirteen applicants from synodical colleges to fill those positions at synodical colleges.

At the end of that year this church is able to find two more people who are graduates of synodical colleges. The church discharges the two non-synodical college graduates, hires the two synodical college graduates to teach at its school.

Are the two discharged teachers eligible for unemployment compensation?

Q Their loss of employment in that situation is [202] through no fault of their own and they would be eligible. There would be no misconduct on their part. The employers would find them probably since he replaced them, his right to replace employees as he chooses.

Q Are you aware of the definition given to the term "misconduct" in the State of California?

A No, I am not. I cannot quote it to you.

Q Does the definition of what is misconduct differ on a state-by-state basis?

A The words, you being a lawyer, you know the words are not the same in each case. The intent of the words are generally the same but the words would not be

the same. There would be fity different sets of words describing what "misconduct" was.

Q Is incompetence misconduct?

A No, not ordinarily. There would have to be willfulness to show that; there was a deliberate intentional poor work performance that was within the person's control for incompetence to be. But unable to measure up to the employer's standards for reasons beyond the claimant's control generally is not misconduct.

Q If a teacher in a school operated by a church proved themselves to be incompetent to communicate the doctrine of the church, the teacher was fired, I take it [203] the teacher would be eligible for unemployment compensation in your experience; is that right?

A He could perform that work to the employer's satisfaction?

Q Yes.

A And his acts were not willful or deliberate?

Q Yes.

A Then he would be eligible. It would not be construed as misconduct.

MR. DAUCHER: Thank you. I have no further questions.

THE COURT: Anything further? Mr. Sheinfeld.

MR. SHEINFELD: Just a few brief questions.

REDIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Carter, I believe during Mr. Ball's questioning there was some discussion of the question of how the concept of willfulness is involved in these determinations. Can you explain to the Court how the question of willful activity becomes a part of unemployment insurance adjudications?

A The last question that the other lawyer posed was one of incompetence or negligence. The unemployment [204] insurance law does not provide for disqualifying people who are out of work through no fault of their

own, and certainly people cannot—everyone is not qualified to be a helicopter pilot or to do a job to an employer's satisfaction. So that in order for them to decide that an act is willful, we have to know whether the person could do it and if he intended to ignore the employer's instructions.

So that another element of willfulness comes in: The claimant had knowledge of what rule or performance requirements were, what the employer's rule was.

So in order for there to be misconduct in some cases there has to be knowledge of a rule and willful disobedience of that rule.

Q So the judging of willfulness is involved both in Mr. Daucher's example of the incompetent employee and also with the example of an employee fired for misconduct?

A Yes. Some acts are so gross that on the face of them, if you were to steal, that that is often not an element that you would consider in willfulness there.

Q Mr. Carter, in response to a question of the Court you indicated that it is necessary for the initial claims adjudicator to involve himself or herself in issues of reasonableness of work rules. What kinds of issues and what questions or matters would be discussed or be involved [205] in judging the reasonableness of a work rule?

A Whether or not the rule was necessary for the conduct of the employer's business, whether or not the work rule affected the employee's health and safety. A work rule could also involve a method of doing business which was questionable.

Q So it would be safe to say, Mr. Carter, that the reasonableness of the work rule depends on the nature of the employment?

A Yes.

Q So that in the same way that drinking by a truck driver might be irrelevant to his employer, drinking by a bank teller would be relevant to his employer?

A I don't think the example is good because truck drivers have to drive, and it is not good to drive.

Drinking by an auto mechanic who repaired, not in connection with work, not during working hours, would be irrelevant, I think.

Q But in the same way that you would look at the nature of the employment to determine what was or was not misconduct, is the same type of inquiry involved in examining the reasonableness of the work rule?

A Yes.

Q Now, there was another question raised I believe [206] by Mr. Daucher involving an issue of whether the employer and the employee disagree about the nature of the church doctrine. Could you explore that issue, but let me frame it in the question of: How are cases adjudicated where there is a disagreement between the employer and the employee about a work rule?

A Well, the first question would be, again: Did the employer advise the claimant, the employee, that there was such a rule? Was the rule reasonable in terms of the conduct of the business? Was the claimant's behavior willful in disregard of the rule? Did the employer make any efforts to prevent or control the violation of the rule, and that would be by advising the person of the rule.

I don't think I can quickly think of another thing we might ask. We would have to know exactly what the rule was and its enforcement. If it was enforced, not enforced, if there were twenty employees and only one was discharged for violating the rules and all the others did it, then of course, that would not be misconduct, more than likely.

MR. SHEINFELD: Thank you very much, Mr. Carter. I have no further questions.

THE COURT: Anything further?

MR. BALL: I have questions, your Honor.

[207] THE COURT: All right.

MR. BALL: May I?

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. BALL:

Q You were testifying with respect, just now, to the employer's duty to have taken reasonable steps to enforce its rules. Now, suppose that the employer's religious principles are such that the employer is not to employ any manner of enforcement but relies solely on the good spirit within the teacher to conform to the rules.

How is that adjudicated? No reasonable steps to enforce being taken, is the point.

A You are suggesting that the rule was not important enough to be enforced or talked about? Or was there condonation and violation of the rule by other employees?

Q No. I do not suggest that the rule was not important enough, but let us suppose the rule is important.

A But not enforced?

Q No steps taken to enforce it; that's right.

A And at the time of hire he was told it was a rule once. I would have to know what the act was because, [208] as I said before, some acts on the face of them do violence to an employer-employee relationship, and some acts are understood—like coming to work; you don't have to tell someone that this job requires that you come every day.

THE COURT: And you don't have to tell them not to commit a felony.

THE WITNESS: Yes. You don't have to tell them not to commit a felony.

BY MR. BALL:

Q Let's suppose that this is a situation in which the rule is that—well, let's suppose it is one item of a statement of faith and it is an item which says that the employee, the teacher in the religious school, is to do certain things, such as pray with the children each norning. Take that as an example. The individual is neglecting to do that and the employer never comes to that person and

says, "Say, are you forgetting your daily prayers for the children? You must do that or you will be cut off. We warn you."

Doing none of that because the employer, the employer's religious principles are that the individual is to be guided by a good spirit within. So the reasonable steps to enforce are not taken. Then the employer one day says, "Goodbye. You are discharged."

[209] Now, how was that adjudicated?

A With great respect, I really have trouble understanding the amount of zeal and religious feeling you are talking about.

Q I can well understand that. I can well understand, Mr. Carter, the situation which would be very perplexing to a governmental administrator or agent to have to get into that area as to what the internal law or regiment of a church would be; whether it does in its own law have to take steps to enforce, et cetera.

The next question I'd like to ask you is this: You mentioned just now about—

A Sir, excuse me a minute.

Q Yes.

A If I could just go back to that question.

The adjudicator is not alone; he has—We are in California. He has a state law and state policies to assist him in making a determination so that he isn't internally drawing up a decision in the case on his own. There is probably, will be precedent decisions or advice from the legal people in the state to assist him with it, so there are going to be policy matters to assist him. He is not acting on his own in making individual decisions.

Q No, there will be more people and more [210] governmental supports for making this determination about the internal life of the Church, right?

A Not more people. There already exists an apparatus in the structure for making determinations and appeal boards. It probably wouldn't be necessary to hire additional lawyers.

Q Now a moment ago you said, "If the rule were important. . . ." Those were your words. Does the hearing examiner ever get into the question of whether the rule is an important one, the rule of the church is an important one?

A Well, the church?

Q Yes.

THE COURT: What you are talking about is whether it is a major or a minor consideration, a major or a minor rule?

MR. BALL: I am, your Honor, yes.

THE COURT: Yes.

BY MR. BALL:

Q And I used the term "important" because the witness had. The question of how important that particular doctrine, teaching, rule, observance, et cetera, is to the church.

Now, do they get into that question of how important [211] it is?

A Would they, you are saying?

Q Well, under your procedures.

A Well, whenever the question comes up on a work rule they would evaluate, and I think I have said before, whether or not the rule is enforced.

Q That is not the question. I asked you whether they would determine whether it is important or not.

A They would determine whether or not it affected the employer's conduct of business.

Q They would determine whether it affects the employer's conduct of business; is that your answer to my question—"Do they determine whether the rule is important?" Would you like to answer that?

A They would have to know what the effect of this was on the employer's business. And I am not speaking just generally of church.

THE COURT: The examiner would have to consider the importance of this infraction, the importance of the effect of this infraction on the employer's business?

THE WITNESS: Yes.

THE COURT: That is right, isn't it?

THE WITNESS: That's correct. For instance, an employer could have a dress rule that a person who had [212] no public contact—for instance, if the person was a woman and wore pants and he said—this person had no public contact—and he said, "I don't want you to wear pants."

BY MR. BALL:

Q Let's come back to the wording, "the effect of this on the employer's business." Now, let's suppose that the business to which you referred is religion. So the examiner makes a determination of the effect of that on the religion or the church, right? Is that your meaning?

A Yes, they would.

Q Is it your meaning?

A Yes.

Thank you. Now let's get on with this.

The employer therefore, the church in this case, may say: "This is of major effect." But the hearing examiner would not have to follow that determination, is that correct? Yes or no.

A Do I have to say "yes" or "no"?

Q I asked if you would.

A Can I say more than "yes" or "no"?

THE COURT: Yes.

THE WITNESS: All right. He would have to know the effect or the importance of that rule and, as I said, he probably would be guided by state policy in that matter.

[213] BY MR. BALL:

Q Well, he would be guided by state policy therefore as to—

A All the determinations are made under the law.

Q Please don't interrupt me.

He would be guided by state policy on how important this religious matter was; all right.

A Was there a question?

THE COURT: Have you answered it?

MR. BALL: Well, I have tried to restate the answer that he gave.

Q Is that the answer?

A He would—First, he is not deciding on the importance of the religious rule. He is deciding whether there was misconduct in connection with employment. So that he wouldn't be saying that, to make that decision he has to decide whether this rule and the violation of this rule is misconduct. He is only making a determination under the state law.

Q I understand.

A I am trying not to say a church rule is unimportant; that is what I am trying not to say because I am sure all your rules are important.

Q Now, you have been testifying that harm to the [214] employer is measured by the hearing examiner; am I correct in that?

A Yes. Again, guided by state policy and laws.

Q Yes, exactly. Now, in the following example I would like you to tell the Court the degree, how the degree of harm would be determined.

Suppose now that there is a teacher in a Christian school who tells the church school authorities but does not tell anybody else, nobody, that she no longer believes in God. She is dismissed for misconduct. But she said she did no harm to anybody because she committed no overt act.

The employer contends it is very much harmed by the very presence of a silent nonbeliever; that is to say, a nonbeliever within the school. How does the hearing examiner adjudicate that?

A The speech is an act saying to the church, "I do not believe in God." If her contract of hire and the

agreements of her employment was such that that was required, then I think perhaps the employer may be within his rights in discharging her. Again, that is a matter for state law and policy, and I am speaking hypothetically.

Q When you say it is a matter of state law or policy then, you are saying it is conceivable that this [215] would not even be considered conduct, let alone misconduct?

A Ordinarily the rules are that there has to be an act or omission in connection with work for there to be misconduct. And again, a statement that had no harm but violated a contract of hire would seem to be incorrect to me; that that did not go to the students, that she was hired under this condition, that she maintain faith or whatever. Then to renounce that, it would seem that there would be a breach of the contract of hire.

Q Even though the teacher in that case might say, "I have never communicated my disbelief to anybody but to the school authorities"?

THE COURT: Do I understand you to say that you would not find misconduct in that situation because there is no harm to the employer?

THE WITNESS: Well, when I said—

The first time I said if that was the agreement that in order to obtain the job that you had to be a faithful person, you had to accept certain tenets, and this was the condition under which she was hired, then the person renounced those tenets; it would seem that that did violence to the original agreement they had.

THE COURT: All right.

THE WITNESS: And although they had not espoused [216] it in front of a classroom, it would have done violence to their original agreement.

THE COURT: So you would find misconduct there?

THE WITNESS: You are asking me my opinion on this and I would think yes. But again, it would be a matter for state policy and state law.

BY MR. BALL:

Q Now, we have been talking about work rules or lack of them. You spoke of justifiable cause for an employee's quitting.

Suppose that in a Christian school you have a teacher of science, Mr. Carter, and the school's statement of faith makes no reference to evolution. But the school, after the individual is hired, insists that he teach that evolution is false.

A He teach—

Q Wait. I am not done with the question.

They insist that he teach that evolution is a false doctrine. The teacher, however, believes evolution to be true. And finally, after quite a bit of tension, the teacher quits voluntarily, claims unemployement compensation. The school says there was no justifiable cause.

How would the hearing examiner proceed to determine that question?

[217] MR. SHEINFELD: Your Honor, I respectfully object to that question. There was no testimony on direct of any sort regarding questions of determinations of voluntary quitting.

THE COURT: Read the question back.

(Question read.)

THE COURT: All right. Overruled.

You may answer the question, if you can.

MR. BALL: Thank you.

THE WITNESS: This is a work rule that was introduced subsequent to the contract of hire and at no time agreed to by the employee and he leaves. Then I would say he would—we would ask him what steps—was he told he would be dismissed if he didn't teach this. And he would have to show, the burden of proof here would be on him to show he had good cause for leaving.

So we would ask, you know, "What harm would come to you by doing this? Were you asked to do something that would harm you, and what steps did you take to correct that."

MR. BALL: I have no further questions, your Honor.
THE COURT: All right. Mr. Daucher.
MR. DAUCHER: I have one, your Honor.

RECROSS-EXAMINATION

[218] BY MR. DAUCHER:

Q In your answer to one of Mr. Sheinfeld's questions I believe you gave a list of kinds of things that a hearing examiner looks into. One of those things on the list was uniformity of enforcement of the rule.

Do you recall that testimony?

A Yes, I do.

Q If we were dealing with the contraception issue, would the hearing examiner listen to evidence of this sort: The church offers to bring before the hearing examiner twenty other teachers who have been discharged for the same reason. Would that be important to the hearing examiner?

A To show that this was a rule that was enforced?

Q Yes.

A Yes, that would be important.

Q Okay. The discharged teacher offers to bring before the hearing examiner twenty witnesses who will testify that they espoused the same thing and were not discharged. Would the hearing examiner listen to that evidence?

A I don't know if that has meaning. They would have to add that the employer knew of it. Just stating that doesn't have meaning to me.

Q Let's add the other element: offer to bring [219] before the hearing examiner twenty witnesses who had done the same thing but not been discharged.

A That would be a consideration.

Q The hearing examiner would listen to that evidence?

A Yes, if the person—he couldn't ignore a statement from a claimant that this was the case. He would have to weigh that in his final decision, along with the employer's statement.

Q In a case therefore between a claimant and a church regarding disagreement over doctrine or enforcement, it would be incumbent upon both of them, would it not, to bring before the hearing examiner evidence of the zeal with which this doctrine was followed?

A This hearing, with a small "h," doesn't involve twenty witnesses coming to the local office or requiring the employer to bring twenty witnesses to the local office to state contradictory—to make contradictory statements. But whatever evidence the employer had, the examiner or adjudicator would be obliged to weigh in making a decision. And in this case it would be a statement that he had fired twenty other people for violating the rule about contraception.

MR. DAUCHER: Miss Reporter, would you read back [220] my question, please. I don't believe the witness has answered it.

THE COURT: No, he didn't. He may not have understood it.

THE WITNESS: I'm sorry.

(Question read.)

MR. SHEINFELD: Your Honor, I'd like to object to that question, only to the extent that Mr. Daucher began it with "therefore."

THE COURT: Yes.

MR. SHEINFELD: And then began discussing enforcement and zeal. The previous question was not about zeal.

THE COURT: All right.

Just rephrase it.

MR. DAUCHER: I will leave off the "therefore."

THE COURT: All right. Give it to him again.

MR. DAUCHER: Do you want me to ask the question?

THE COURT: Please.

BY MR. DAUCHER:

Q In a hearing with a small "h" it would be incumbent, would it not, upon the claimant and upon the church in a case involving dispute regarding church doctrine [221] of enforcement to bring the hearing examiner evidence of the zeal with which the particular doctrine was pursued?

A Yes.

MR. DAUCHER: Thank you.

MR. SHEINFELD: Can I ask one more question, your Honor?

THE COURT: You may.

FURTHER REDIRECT EXAMINATION

BY MR. SHEINFELD:

Q With respect to your last answer, Mr. Carter, by "zeal" did you mean that it is necessary for the hearing examiner to look into whether or not the particular rule was enforced?

A That's what I meant.

MR. SHEINFELD: Thank you very much.

I have no further questions.

THE COURT: All right. Anyone have anything further?

The witness may step down. Thank you.

THE WITNESS: Thank you.

MR. SHEINFELD: If we could have about a minute recess, your Honor, while I track down my other witness.

THE COURT: All right. We will just wait, [222] Mr. Sheinfeld.

MR. SHEINFELD: Thank you.

I'd like to call Mr. Bernard Streett.

(Brief pause.)

BERNARD STREETT,

called as a witness on behalf of the federal defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell the last for the record.

THE WITNESS: Bernard Streett, S-t-r-e-e-t-t.

DIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Streett, would you please provide the Court your present address and occupation.

A My present address is 7807 Gaywood—that is one word—Circle, Baltimore Maryland 21207. My occupation is supervisor of the appeals unit for the unemployment insurance service, Employment and Training Administration, Department of Labor.

MR. BALL: Your Honor, if you will pardon me. Could that last answer be repeated? I couldn't hear.

THE WITNESS: I'm sorry. My occupation is [223] supervisor of the appeals unit in the unemployment insurance service for the Employment and Training Administration, United States Department of Labor.

MR. BALL: Thank you.

BY MR. SHEINFELD:

Q Mr. Streett, could you give us and enlighten the court to your education and work background.

A All right. My educational background is:

I was graduated from the University of Baltimore, School of Law. I was graudated cum laude; was a member of the school's High Star Honor Society, which is a scholastic honor society. I was graduated in June, 1952.

I was admitted to the bar of Maryland in October—I am sorry; June, 1953, and I was admitted to the bar of Maryland in October of 1953.

Q Could you go on from there, after you left law school.

A Okay. Shortly after I left law school I went to work for the Maryland Department of Employment Security as an appeals referee for a period of one year.

Q Excuse me. What kind of appeals; in what program?

A This is unemployment insurance benefit claim appeals. For the next seven years, for a total of eight, [224] I was senior appeals referee in the same agency.

Following that I went to work for the United States Department of Labor in the unemployment insurance appeals program.

Q Excuse me a second. What year did you begin with the United States Department of Labor?

A December of 1962. And I have worked there continuously since that time in the appeals program. Presently—well, I gave you my present job title.

Q What is the nature of your present occupation?

A We review or we offer guidance and assistance to state employment security agencies in the appeals area for unemployment insurance benefit claims.

Do you want me to elaborate on this?

Q If you would, please.

A All right. Basically, we deal with two primary functions. One is in the area of promptness, promptness of adjudication. Unemployment insurance benefits are for non-deferable living expenses, intended for that, and we conceive of our obligation as seeing that the states issue decisions promptly. We expect them to issue approximately 60 percent of their decisions within 30 days, and 80 percent within 45 days.

We offer assistance to states when they are [225] unable to meet these objectives. The other general area is in quality of the hearing and decision-writing process. We do an evaluation, annual evaluation of the quality of the hearing and the decision.

We have a training program in hearings and decision writing which we offer to the states. I suppose we have twelve or thirteen hundred referees in the country; I imagine I have met six hundred of them at these training sessions.

The states, the quality or the qualifications for the hearing officer job in the states vary. In California,

for example, their requirement is membership at the bar; in many states it is not. And for this reason I believe that our training program is rather popular.

Q Would it be safe to say, Mr. Streett, that it is the function of your office at least in part to monitor the nature of the hearing processes that take place in the states and how those processes function?

A Yes, we do.

Q Now let me ask you: Are you familiar with Mr. Ernest Carter?

A I am sorry. I didn't hear your question.

Q Are you familiar with Mr. Ernest Carter?

A Oh, yes.

[226] Q How does the nature of your operation differ from the nature of his?

A Well, ours is a, I guess you'd call it a quasi-judicial hearing process. An evidentiary hearing is allowed to any individual whose claim for benefits is denied, and employers have a corresponding right to a fair hearing.

Q Just so you will be familiar with whatever jargon comes up, the activity of Mr. Carter's office was referred to as "hearings with a small 'h.'" I assume we are now talking about, with your operation, hearings with a big "H"?

A Our operation deals with hearings; with hearings, yes.

THE COURT: You take evidence on the record in the hearings you are talking about, don't you?

THE WITNESS: Yes, we do. As a matter of fact, in all states but two the appeal to court is on the record, made before the administrative agency.

BY MR. SHEINFELD:

Q Does the United States Department of Labor provide to state agencies guidelines or guidance as to how these hearings should be conducted?

A Yes, we do.

[227] Q Does that guidance at times include suggestions as to how particular fact patterns may or may not be adjudicated?

A Particular fact patterns?

Q As hypotheticals.

A Yes, yes, particularly in certain areas.

Q Let me ask you, Mr. Streett: Are you familiar generally with the issues surrounding the coverage of employees of elementary and secondary schools under the 1976 amendments to FUTA?

A Yes.

MR. SHEINFELD: Your Honor, I would offer Mr. Streett as an expert on the issue of the federal standards for adjudication of claims in formal hearings before state unemployment insurance agencies.

THE COURT: Mr. Daucher.

MR. DAUCHER: I would like the opportunity to voir dire, ask Mr. Streett some questions.

THE COURT: You may do that now.

Well, we will recess until 1:30, and then you can do that.

Will you wish to do that also, Mr. Ball?

MR. BALL: No, I will not, your Honor.

THE COURT: All right.

(Recess taken until 1:30 P.M.)

[228] LOS ANGELES, CALIFORNIA;
WEDNESDAY, AUGUST 13, 1980; 1:30 P.M.

THE COURT: Mr. Streett.

BERNARD STREETT,

the witness on the stand at the time of the recess, having been previously duly sworn, resumed the stand and testified further as follows:

THE CLERK: Mr. Streett, you are reminded that you are still under oath.

THE WITNESS: Yes.

VOIR DIRE EXAMINATION

BY MR. DAUCHER:

Q Mr. Streett, when you worked as a referee, as an appeals referee for the unemployment insurance program in Maryland—and I believe, if my notes are correct, the years were approximately 1953 to 1962 that you did that,—

A That's correct. I had two jobs there. One was a referee and the other was senior referee. They were similar.

Q Did Maryland have in its unemployment tax law at the time an exemption for non-profit organizations?

A Yes.

Q So I take it that during the time that you were [229] an appeals referee in Maryland you never heard any case that had anything to do with a non-profit organization, much less a religious, non-profit organization; is that correct?

A Not exactly. As a matter of fact, I can recall a case that turned on this point, religious belief, and this type of thing; a hearing that I held.

Q So you did have, during the time that you were an appeals referee in Maryland, you did have a case involving a non-profit organization?

A Yes, one that I can recall very vividly.

Q Without telling me the issues, how did that case arise, Mr. Streett?

A A claim for benefits was filed by the claimant and apparently on the basis of information that the claims examiner received from the employer, the last employer. It was a religious organization. The claimant was denied benefits and he filed an appeal from which we held a hearing.

Q You held a hearing despite the fact that there was an exemption in the Maryland unemployment insurance law for non-profit organizations?

A Yes.

Q Was there some question about whether his employer was a non-profit organization in that case?

[230] A No, not really.

Q But you held a hearing anyway?

A That's right. We often, we hold hearings when there is no employer at all involved.

Q What were the issues in that hearing that you held, if you can recall?

A The issue was whether he was discharged for misconduct connected with his work.

Q Can you tell me why you even reached that issue if the employer, to begin with, was not one from whom a discharged employee might collect unemployment insurance?

A Yes. It isn't a contest between employer and employee; it is an adjudication of a claim of unemployment benefits. The claims office felt, on the basis of information they secured from the employer, that this particular individual was not entitled to benefits.

Q Perhaps you misunderstood my question. My question goes to this fact: How do you even reach the misconduct question if you don't have an organization whose employees would be covered by unemployment insurance to begin with?

A Well, the individual involved had apparently earned his wage credits from some other employer that was within covered employment, and then he went to work for [231] this organization. I don't recall just where he earned wage credits or this type of thing. As a matter of fact, it wasn't of any significance and I doubt that I questioned him on it.

The question was, and the issue before me was whether or not the individual was discharged for misconduct from his last employer.

Q In that instance the non-profit employer would not be the one financially concerned with whether unemployment insurance benefits were awarded to the person, would he?

A That is correct.

Q Since 1962 have you conducted any hearings regarding unemployment insurance benefits?

A Yes, for a period of about a month. I don't recall the dates; I would say about three years ago in the District of Columbia on a temporary loan basis.

Q How many hearings did you conduct during that period of time?

A I would say approximately 65 to seventy.

Q Was this prior to January 1st, 1978?

A Yes, it was. It was approximately three or four years ago, I suppose.

Q Did any of these hearings involve a dispute [232] between a church school and a discharged employee regarding the reasons for discharge?

A No.

Q Have you ever attended a hearing at which the issues involved a dispute between a church and a church employee regarding the reasons for discharge?

A I don't recall any other than the one that I mentioned which I conducted myself many years ago.

Q Have you ever read the transcript of any hearing where the issues involved a dispute between a church school, the discharged employee, regarding the reasons for discharge?

A I don't recall any.

Q In your capacity as an assistant to state unemployment programs in the training area, have you written any guidelines for state hearing examiners to use in connection with hearings between churches, church employees, regarding the reasons for discharge?

A We have issued guidelines for all hearings, no matter what issue or who was involved, but not specifically church employees and church institutions. Our

guidelines are general and are intended to cover all hearings.

MR. DAUCHER: Your Honor, that is the end of my questions for this witness. To the extent the witness is [233] offered as an expert on what federal guidelines are or what would happen during a hearing between a church and a church employee regarding the reasons for discharge, I would suggest that he has demonstrated no expertise there.

MR. SHEINFELD: Your Honor, I would make two points in response to that.

In the first place, to demand, as Mr. Daucher apparently does, that the witness have expertise in adjudication of this specific type of claim is an impossibility since this provision was only added in 1978 and has been in litigation almost continuously since then. So there have been virtually none, or hardly any, claims of that type.

Secondly, we are offering Mr. Streett's testimony on a somewhat narrower basis. As I indicated with respect to Mr. Carter, the federal government is required under FUTA to supervise the operation of the state unemployment insurance programs. That supervision, as both Mr. Streett and Mr. Carter testified, involves reviewing the manner in which claims are adjudicated and determining whether that procedure is correct under the federal standards.

We offer Mr. Streett for the purpose of establishing whether or not a certain class of claims—how that particular class of claims should be adjudicated under the federal standards.

[234] I would make one further observation. It is the plaintiffs who have raised the issue of the purported entanglements involved in the adjudication of unemployment insurance claims. They have offered in their case in chief as testimony, no evidence, no independent case whatsoever that there is such a problem except rank speculation.

We certainly would believe it is incongruous, at best, for the plaintiffs to now object to the testimony of a witness who can provide the very information that we are all seeking.

THE COURT: Well, let's hear what the questions are. Mr. Daucher has a good point.

We will hear what your questions are. Start.

DIRECT EXAMINATION (Resumed)

BY MR. SHEINFELD:

Q Mr. Streett, let me present to you a series of hypothetical questions, and I am then going to ask you whether, based on your experience with respect to the federal standards established for the adjudication of claims under unemployment insurance programs, how these claims should be adjudicated.

The first hypothetical question involves a teacher who is teaching in a church-affiliated school. [235] The beliefs of that school and the operators of that school include the fact that the Bible is the original and direct word of God. When that employee teaches his students that the Bible is not the direct word of God and is then fired based on those facts and pursuant to the federal standards as you are familiar with them, should that claim be adjudicated by a state referee without reference to the correctness, sincerity or accuracy of the beliefs of that school?

A Oh, yes.

MR. DAUCHER: I have an objection to the form of the question.

THE COURT: All right.

MR. DAUCHER: First, there's been no foundation laid for what we are talking about when we talk about "federal standards." The witness responded, I believe, to one of my questions.

THE COURT: That's correct.

You have to rephrase the question.

BY MR. SHEINFELD:

Q Well, let me create a little further background.

Mr. Streett, pursuant to the responsibilities of your office do you give guidance to the state agencies as to how adjudications involving questions of misconduct in connection with the work should be conducted?

[236] A Yes.

Q Do you in the course of your normal business activities review the manner in which the agencies make such adjudications?

A Yes.

Q Do you then advise the state agencies as to whether or not the manner in which they are making those adjudications are proper?

A Yes.

THE COURT: Now, is there something that is called "federal standards"?

MR. SHEINFELD: I believe there are. There are standards.

THE COURT: All right. Let's clear up what they are, then.

BY MR. SHEINFELD:

Q Mr. Streett, through what mechanism are the criteria and standards with which you judge the activities of the state agency, how are they communicated to those state agencies? How do they know what you expect them to do?

A Well, we have developed criteria with which we evaluate the quality of hearings. All states have received these criteria. All states do their own evaluation on a [237] sample basis and they look at the work of every hearing officer within the state at least once a year.

One third of these, one third of the states in the nation submit their worksheets, their decisions, and the transcript or tape recording of the hearing to us for validation every year. It is on this basis that we—

THE COURT: On a rotating basis?

THE WITNESS: Yes, ma'am; that right. One third every year. We do approximately seventeen states a year this way. It represents the work of almost all the referees in the country, or hearing officers.

BY MR. SHEINFELD:

Q Let me ask you, Mr. Streett: Can you explain to us in general terms what the criteria are with respect to the adjudication of claims involving separation?

MR. DAUCHER: Objection, your Honor. I don't wish to be overly technical because I believe I want this testimony in the record as much as the federal defendants do, but the witness has testified that these criteria are written to the states and are in writing. We have got, first of all, therefore, the best-evidence problem.

I'd suggest that unless there is something to hide with respect to what that criteria contain that the federal defendants consider producing the written criteria [238] that are given to the states.

THE COURT: There are written criteria, aren't there?

THE WITNESS: That's right.

THE COURT: Do you have them with you?

THE WITNESS: No, I do not.

THE COURT: Do you have them with you?

MR. SHEINFELD: No, your Honor, I do not. I certainly can supply them to the Court.

THE COURT: All right. When?

MR. SHEINFELD: Within a week of my return to Washington, your Honor, or less.

THE COURT: Well, that won't help him now with the examination of the witness.

MR. SHEINFELD: Your Honor, they were aware of the fact that Mr. Streett was being called as a witness and what he was being called for.

THE COURT: But I don't think they could anticipate the question you asked, could they? You know, having him describe them when they actually exist is not very satisfactory, so go on to another line of questioning.

MR. SHEINFELD: Well, your Honor, my next line of questioning, unless the Court wishes me to move in another direction, would be to simply re-pose the [239] hypothetical. Now, if the Court desires some further elucidation of Mr. Streett's background before I move on to that, I'd be happy to do so.

THE COURT: No, I think we know enough about this background now, so re-pose the hypothetical.

BY MR. SHEINFELD:

Q Mr. Streett, let me suggest to you a hypothetical situation and ask you if, based on your experience and training, you have an opinion as to how that situation should be handled under the standards set for the adjudication of claims.

The hypothetical question involves a teacher in a church-affiliated high school and the sincere and true beliefs of the operators of that school include the fact that the Bible is the true word of God.

MR. DAUCHER: We are back to the same problem, your Honor.

THE COURT: You are back to the same problem of not having the written standards.

MR. BALL: That's correct.

MR. DAUCHER: I might make a suggestion because, as I say, I don't—

THE COURT: Because I intend to move along with this trial, and so whatever you have to suggest.

[240] MR. DAUCHER: Well, these written standards have to be someplace here in California if they are communicated to the states.

THE COURT: Certainly. They also could be telexed here; there is no reason why we have to wait a week or ten days for those standards.

BY MR. SHEINFELD:

Q Mr. Streett, how extensive are these criteria that we are talking about?

A Every state has copies. The main office in California is in Sacramento, but I wouldn't be surprised that there is a copy of it available in the office in Los Angeles.

THE COURT: Right here?

THE WITNESS: I think so. I'm not sure. We send it, of course, to the headquarters, and they distribute it as they see fit. But I would think there would be a copy here; there may not be.

MR. SHEINFELD: Excuse me, your Honor.

THE COURT: I suggest you get the help of your co-defendants and have one of the counsel call.

MR. SHEINFELD: If the Court could excuse me for a moment.

THE COURT: Yes.

[241] (Brief pause.)

THE COURT: All right. What is your decision?

MR. VESELY: We will attempt to get them.

THE COURT: All right. On that basis I will let you go on with the examination.

MR. SHEINFELD: Could the reporter read back the last question.

(Question read.)

THE COURT: All right. Now, that is not a question, that is an incomplete question. So ask the question and make it into a complete question.

Now, I want to explain something to you: If they do not have the opportunity to see those written standards and cross-examine the witness about them, I will strike the witness' testimony about this. But we have to get along on this trial, so you go on.

MR. SHEINFELD: Yes, I understand that, your Honor.

THE COURT: All right.

BY MR. SHEINFELD:

Q Mr. Streett, do you understand the hypothetical situation that's been posed?

A Yes, I think so.

Q Do you have an opinion as to how a situation such [242] as that described should he handled under the federal standards set for the adjudication of claims under unemployment insurance?

A Yes.

Q What is your opinion?

A We look at the contract of employment between the worker and the employer. If there was an understanding at the inception of employment that certain religious principles were to be taught, an understanding by both parties, and if during the course of employment it was violated, this would be very significant in the decision which would probably effect a denial of benefits.

On the other hand, if there was no understanding between the parties at the inception of employment, the decision would probably go the other way and effect an allowance of benefits, without disqualification.

THE COURT: Just a minute.

Read the answer back.

(Answer read.)

THE COURT: Go on.

BY MR. SHEINFELD:

Q Mr. Streett, let me pose to you a second hypothetical involving that same teacher employed in that same school. In this situation he is discharged when the school [243] finds out that he was seen in a bar drinking.

Well, let me just ask you that. Just based on that information, when that person is terminated for that reason, do you have an opinion as to how that situation—

A Yes.

THE COURT: Mr. Streett, in this hypothetical, assume that the person was not an alcoholic and was not overindulging in alcohol but was drinking one drink in a perfectly legal establishment and was behaving in an otherwise proper fashion.

THE WITNESS: Yes. My view is this: that if he had an understanding—We look to the contract of employment. If he had an understanding at the inception of employment and agreed that he would do no drinking, that would be quite significant and probably effect a denial of benefits.

On the other hand, if nothing was said about it or he didn't have such an understanding, I would presume that benefits would be allowed in that situation.

BY MR. SHEINFELD:

Q Let me ask you one final question, Mr. Streett.

During the course of your involvement with the unemployment insurance program with the United States Department of Labor, are you aware of any issues arising [244] under Section 3306(d)(2) of FUTA involving issues of partial coverage?

A Yes.

Q Can you explain to the Court how such issues arise.

A Well, sometimes a worker works in two distinctly different areas and he may be—

Q Can you give the Court an example of that situation?

A Yes. Let me draw an example from my own experience when I was a hearing officer with the State of Maryland.

On the eastern shore of Maryland there are large farms, what I call "large," and adjoining canneries. Now very often employees will work on the farm and in the cannery at different times. This was years ago when agricultural employment was excluded from coverage.

However, the work in the cannery was covered, so we had that situation there. And I, as senior referee, I had most of this type of case. The distinction between the referee and the senior referee in the state was a type of case that we heard.

I would, as senior referee, I would get this type and others.

[245] Q So Mr. Streett, it would be correct to say that under unemployment insurance programs in conformity with FUTA, the difficulty or the question of determining coverage of employees who do different kinds of work is common?

A Well, we don't have a lot of hearings on this. But it happens; it happens often.

MR. SHEINFELD: I have no further questions, your Honor.

THE COURT: All right. Mr. Ball.

MR. DAUCHER: May I make the inquiry as to the code section that you recited that these split hearings come under?

MR. SHEINFELD: It is 26 U.S.C. 3306(d)(2). Let me check to be sure.

CROSS-EXAMINATION

BY MR. BALL:

Q Mr. Streett, do you monitor the nature of the hearing process?

A Yes, sir; sometimes.

Q Yes, I understood you to say you do. Does that hearing include hearing claims of exclusion?

A Yes.

[246] Q The hearing process does?

A Sometimes, of course. Not often, but sometimes.

Q Have you ever been employed by a religious school?

A Never.

Q Ever been employed by a private school?

A Never—oh, yes; as a matter of fact, I was. No, no, it is a public school.

Q Are you familiar with any directives from the Department of Labor or a directive from the Department of Labor dated May 30, 1978 which states that the only employees who are excluded from the coverage in religious schools are those who perform strictly church duties?

A Yes.

Q You are familiar with that?

A I have read it.

Q Yes. Is that now the position of the Department of Labor?

A Yes.

Q Then there are teachers in religious schools who are excluded?

A I'm sorry; I missed your question.

Q Then there are teachers in religious schools who are excluded?

[247] A Excluded from coverage?

Q Yes.

A I think teachers would be covered, most teachers.

Q Well, you just answered that there were some who are not.

A I don't recall that.

Q Well, I will recall it to you. Just a moment. Let me come back to the May 30th, 1978 statement which you said you were familiar with:

> "The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by Section 3309 (b) (1) FUTA are those strictly church duties performed by church employees at the school pursuant to their church responsibilities."

A That's right.

Q Those are the only ones that are excluded, right?

A Excluded from coverage, yes.

Q Yes. So there are employees who are excluded from coverage?

A Or church—or those with church duties. That is what you said.

Q Strictly chuch duties, would that be correct?

[248] A That's correct.

Q That then is the position and that has not been changed?

A That's correct.

Q Yes. In your instructions to hearing examiners in your monitoring of the hearing process, how was the hearing examiner supposed to know whether a church is involved?

A Whether a church is involved?

Q Yes. That is the question.

A I don't follow your question.

Q Well, it is easy to follow because, first of all, the May 30, 1978 document referred to "church-related schools" and, secondly, the quotation that I gave you and which you repeated is "strictly church duties."

Now, what I want to know is how the hearing examiner figures out whether there is a church involved or not.

A Well, I think that the name of the case would show whether there is a church involved.

Q The name of the case would?

A Yes, the employer's name would show that it is a church or not. I would think that.

I am not sure that I am following your question, [249] though.

Q Now, who makes the judgment that a church is involved?

A Who makes the judgment as to who was the employer, or that the employer was a church; is that what you mean?

Q The latter.

A That the employer was a church?

Q Yes.

A If the judgment had to be made, I presume it would be the hearing officer. I don't know of an instance where the hearing officers made such a judgment.

Q Excuse me, sir.

I'm sorry. Go ahead.

A I don't know of any instance where this was necessary.

Q Right. Now, would you be surprised, Mr. Streett, to know that there are many different definitions of the word "church"?

A I suppose it is. I suppose so. I would think that it would be easily defined.

Q Now, did Congress, in enacting the Federal Unemployment Tax Act, define the word "church"?

A I don't know. I don't think so.

[250] Q You don't know? You are very prominently associated with the administration of this Act or the hiring of people who monitor the hearing process.

You don't know; is that right?

A I don't know the answer to that question, but—

Q Thank you. But a hearing examiner will be able to make that determination; is that right?

A Yes, I think if he is called upon to make it, I think is is a relatively simple thing to define.

Q Now, with respect to an adjudication concerning a work rule of an employer, it was testified by Mr. Carter this morning—I think you heard his testimony?

A No, I wasn't here.

Q I am sorry, then. I will reword the question.

THE COURT: He was excluded from the courtroom.

MR. BALL: I didn't realize that had been for the whole testimony.

Q Well, I will tell you then that Mr. Carter testified that when there is an adjudication respecting a work rule, inquiry is made of whether the employee knew of the rule; and then secondly, according to Mr. Carter, the

question raised is: was the rule reasonable, in view of the business of the employer.

MR. SHEINFELD: Your Honor, I think I will [251] object to Mr. Ball trying to confront this witness with the testimony of another witness whose testimony he did not hear—at the plaintiffs' request.

THE COURT: No, he may do that. It is cross-examination.

Go on.

BY MR. BALL:

Q That the inquiry is made as part of the adjudication process as to whether the rule is reasonable in view of the business of the employer.

Now what inquiry, I would like to know, is followed by the hearing officer to enable him to make a judgment on that issue?

A Well, the hearing officer would first determine whether the rule was understood and accepted by both parties as part of the contract of employment. I would think that it would revolve around his conclusions on this point. If the parties had an understanding that this is the rule, both parties agree to it, it would be found as a fact that this rule—this was a rule, and the further finding as to whether or not it was a violation of the rule.

Q Yes, but my question was this: Let's suppose they both say, "Yes, that is the rule," but the employee says, "That rule is entirely unreasonable."

[252] Now where do you go?

A Well, I would then find out whether the employee knew of the rule and accepted employment with the understanding that he would conform with this rule. If he accepted employment with that understanding and agreement, rather, then I would—and he violated the rule, then I think he would be denied benefits.

On the other hand,—

Q So then, if it is true that Mr. Carter testified this morning that an inquiry is made as to whether the rule is reasonable—that's his testimony—he is incorrect in that, in your view? In other words, the hearing examiner does not weigh the reasonableness of the rule?

A Well, in most instances I would say no. He would accept what the employee and the employer agree to as the contract of employment.

Q Yes, sir, but not in all instances, right?

A There may be some. I don't—there may be some instances in which—

MR. BALL: There may be some?

THE COURT: There may be some instances in which the reasonableness of the rule is considered; is that right?

THE WITNESS: Yes, I suppose so. I can't think of any in connection with the church-related school issue, [253] but in other situations there may be.

BY MR. BALL:

Q Now, you testified a few minutes ago on direct examination to a couple of hypothetical questions that Mr. Sheinfeld posed. He mentioned a case of the teacher who was dischareged because she denied the inerrancy of the Bible. You then said "Well, the hearing examiner looks at the contract. If the contract is violated, that would be very significant in the decision."

A That's right.

Q Now, what do you mean by "very significant"?

A I would assume that it would effect a denial or an allowance of benefits.

Q What do you mean by "it would effect"?

A It would effect.

Q "Effect"?

A Assume that in the hypothetical case the party agrees that he would teach this or not teach this, as the case may be, and he ignores this agreement; does it anyway. This is probably going to be construed as—and

is discharged as a result; this would probably be construed as a discharge for misconduct and it would cause the denial of benefits.

Q Now, the word "probably," the adverb "probably" [254] you bring in there. Does that indicate there is discretion on the part of the hearing examiner to weigh whether or not this would happen?

A Not really.

Q Then why did you use the word "probably"?

A Well, perhaps I should not have used the word "probably." I feel that it would have effected a denial of benefits if the rule had been agreed to and violated. On the other hand, if they—

Q You monitor the process but you—

A I am sorry sir. I didn't hear your last—

Q You monitor the process but you—

A We monitor the process?

Q Yes. You monitor the hearing process?

A Yes, in a way.

Q Yes.

A We don't monitor every hearing, of course.

Q Now, let's suppose that there isn't the contract, there isn't the understanding that you spoke of. In that event you said the decision would probably go the other way and effect an allowance of benefits without disqualification.

A That's right.

Q Yes. So that if this teacher were discharged [255] because she said, "The Bible is not true," and it wasn't perfectly clear from the contract whether or not she had a duty to say it was true, and the church employer says, "We believe that every teacher in this school must teach that the Bible is true," and the teacher says, "No, that wasn't my understanding"—so that there is this disagreement of which you spoke. In that event the hearing examiner finds in favor of the teacher?

A That's correct.

Q Thank you. So it would be the parallel case about the teacher who takes the occasional drink under—

A That's correct.

Q Thank you. Now, is an examiner required to have any specific religious training?

A No.

Q He may nevertheless pass upon a religious issue?

A I don't know how he would pass upon a religious issue.

Q Well, you were asked about a religious issue in testimony you had once given, but I won't repeat the testimony. But I will ask you this question, if you would assume these facts:

A teacher in a church school voluntarily resigns his position in protest of pressure from the minister, who [256] is the head of the school, that minister desiring the teacher to teach that interracial marriage is a sin under the doctrine of the church.

Now, the teacher who resigned then filed a claim for unemployment compensation and the claim is denied and then there is an appeal. Then the claimant presents evidence of other church officials that in fact it is not a sin against the church to marry, to have interracial marriage, but the school presents testimony that it is a sin.

A Okay.

Q Now, we have then conflicting evidence as to what the church's doctrine is. The hearing examiner's job—if this program is to be imposed upon religious schools, that is—the hearing examiner's job is to make a decision as to whether this individual gets unemployment compensation or not.

A That's correct.

Q Now, is this a case—or am I correct?—is this a case in which the hearing examiner would abstain and say, "We don't get into these matters"?

A No. The hearing examiner would then decide whether or not there was—what the understanding was at the time of employment.

[257] Q Yes.

A And it would—

THE COURT: Excuse me just a minute. Go ahead and finish the question. Then I have a question for you, Mr. Streett.

Go ahead. Finish your answer.

THE WITNESS: We look at the contract of employment in almost every case involving an employer and and employee, every hearing that we hold in which there are two parties involved. The decision revolves around the contract of employment; in a misconduct case whether there was a violation, in a quit case whether there was good cause to leave. This is what they look at.

BY MR. BALL:

Q This is the case where we don't have an understanding—

THE COURT: Excuse me just a minute.

MR. BALL: I am sorry.

THE COURT: Mr. Streett, would you not agree that it is very difficult, it would be very, very difficult for a religious school to enter into a contract with a teacher in that school which included all of the things the teacher was supposed to teach?

THE WITNESS: I don't think so. I think that— [258] I think that this, if this were important to the school, I think the teacher would be told this when he or she is being interviewed or when they decide who to take for the job. Generally an employer, particularly in a situtation where there is a professional job like a teacher, generally the employee is told what is exepected of the employee.

THE COURT: Well, let me go back to what I was asking you. We are now talking about specific doctrinal matters that pertain to that religion.

Would you expect that contract of employment to include a specific statement of what those doctrinal matters are and the position the school takes on them?

THE WITNESS: I think the significant ones, yes. There may be some obscure ones that wouldn't be con-

sidered and wouldn't be discussed, but I think, I would think that the employer, the church, would have an understanding with the employee about the significant conditions of employment; and I think this would be a significant condition of employment.

THE COURT: All right.

BY MR. BALL:

Q Now, what if there isn't any understanding? In the case I gave you there is a misunderstanding.

A Okay.

[259] Q Now what do you do?

A In that situation it would lend itself to a decision in favor of the employee.

Q Now let me ask this: Suppose that there isn't any contract at all. Suppose the church within its liberties feels it doesn't go in for contracts; it looks at what the beliefs are, estimates the faith and beliefs of the believing teacher and hires the teacher on that basis. Do you suggest that in order to protect its rights under the unemployment compensation law that a church must obligate itself or is obligated to have a contract with somebody?

A Not a formal contract in any sense. I think all employment derives from contract, and that is what we look at. Very often and probably more often than not there is no formal, written or even oral contract of employment, but all contract derives—all employment derives from contract. There is an understanding at the inception between the worker and the employer as to what is expected and what the remuneration will be.

Q Now let me ask you this: A few moments ago did you refer to provisions of the agreement that are significant, as against those that are not?

A Yes.

[260] Q Suppose that the agreement consists of a statement of faith and a willingness to subscribe to it. Now, would you say that there could be within that some provisions that are more significant than others?

MR. SHEINFELD: I would object to that question unless there is a better description of precisely what a "statement of faith" is.

MR. BALL: Well, I will tell you what it is, if I may.

May I continue, your Honor?

THE COURT: Yes, you may.

BY MR. BALL:

Q A statement of faith, let us say, is a statement of twelve articles of belief that the church has with respect to the existence of God, the hereafter, the lordship of Christ, et cetera, et cetera. That is what a statement of faith would be. I can hand you one if you would like to look at it.

But would you find, since this is the contract, would the hearing examiner possibly find that some parts were more significant than others?

A No, I would think not. When I said "significant" before, I had reference—I intended it to mean something important to the employer, as distinguished from something [261] that is not of importance or not quite so important.

Q The hearing examiner would judge what is important to the employer?

A No. I was, as I recall, I was responding to a question about: Would the employer and the employee go through the process of having a full and complete understanding of every aspect of the religious teaching, and this type of thing.

I think my answer was that the employer, the church, would inform the prospective employee what is expected of the prospective employee and would include in that all things of consequence to the church.

Q Now, the hearing examiner then does not attempt to say that anything is more significant in this relationship than any other thing?

A Well, let me respond this way: The hearing officer's first function is to find as a fact what occurred to

bring about the termination of employment, and then the hearing officer is obliged to decide whether or not it violated any duty the employee owed to the employer.

And if yes, the hearing officer is obliged to deny benefits. If no, the hearing officer is obliged to allow benefits without disqualification.

Q Now, you mentioned that the hearing examiner [262] then examines into, your words now, "what occurred to bring about the termination of the employment."

A Right.

Q Yes. Now let's suppose that what brought about the termination of the employment was a gradual lack of religious enthusiasm upon the part of the teacher, for which he is eventually fired.

A Okay.

Q The hearing examiner then inquires into what occurred to bring about the termination of the employment—namely, the gradual loss of religious fervor. Right?

A Well, we would ask them to be a little more specific, but that is a factual conclusion. We would ask them to be more specific as to just what occurred and perhaps he would, the hearing officer would then draw the conclusion that you have mentioned.

Q Yes, Mr. Streett. My question then to you was: The hearing officer will then go into those circumstances relating to the charge of loss of fervor?

A Yes.

Q Thank you. Now suppose, Mr. Streett, that a religious school which has discharged a teacher claims that the teacher was an excluded employee because the teacher is regarded by this church school as a minister and his [263] teaching as an exercise of his ministry.

Now, the question is: From you as the monitor of the hearing process in which this event occurs that I am going to describe, suppose now that the school, as the employer, raises the objection that you should have noth-

ing to do with this discharge case and there can't be any question of unemployment compensation because the employee is noncovered, is excluded as a minister in the exercise of his ministry.

MR. SHEINFELD: I would object to that question as outside the scope of the direct and beyond the scope of this case. There is no issue in this case about the definition of "ministers" under Section (b)(3) of FUTA.

THE COURT: Well, you may. Is is cross-examination. You may ask that question.

MR. BALL: Thank you, your Honor.

THE WITNESS: Okay. I think that the case would revolve around a discharge—Is this what you are saying, he is discharged? May I ask you to repeat it; I am not sure that I followed it.

MR. BALL: Yes, I will.

Q Simply saying, "Yes, we have a discharged employee." That's right.

A And let me rephrase, let me see if I understand [264] the question.

You have a discharged employee. The employer is not maintaining that the employee was discharged for misconduct but that the employee was not covered by the unemployment insurance law because his duties were religious, as distinguished from non-religious.

Is that your question?

Q No. I was just trying to pose—

A I misunderstood the question.

THE COURT: That is not the question, Mr. Streett.

THE WITNESS: I'm sorry. I misunderstood it, then.

BY MR. BALL:

Q Yes. I am posing a question of an employee or employees of a church school. The church school, the employer, claims that this individual or these individuals are noncovered employees for the reason that the

church says, "These people as a group are ministers in the exercise of a ministry; thus, they are under the statutory exclusion."

A Okay. I understand.

Now, I would—and the question is whether or not they are covered by the unemployment insurance law of the particular state. I would say that it would depend on whether or not they were working as teachers or whether [265] they were ministers; what work they were doing.

Q Thank you. Now, in other words, the hearing examiner would make a determination as to that?

A Yes.

Q Thank you.

THE COURT: Mrs. Brosnan, read the answer back, the question and the answer back.

(Record read.)

THE COURT: The hearing examiner would make a determination as to the duties of that individual; is that right?

THE WITNESS: As to whether or not his duties were exclusively religious or in teaching or something else.

THE COURT: Yes.

BY MR. BALL:

Q I had thought the answer was—maybe I am wrong—as to the substance of it was; you would make a determination as to whether he is a teacher or a minister.

THE COURT: That's right.

MR. BALL: Excuse me, your Honor.

THE COURT: That is correct. That is what your comment was. You are correct about what you just said. You asked him would the hearing examiner make a determination as to whether the person was a minister or a teacher.

[266] MR. BALL: Yes, your Honor.

THE COURT: He has said the same thing back to you in different words.

Isn't that true?

THE WITNESS: That's right.

THE COURT: Yes.

MR. BALL: I have no further questions, your Honor.

THE COURT: Mr. Daucher.

MR. SHEINFELD: Your Honor, before the questioning continues, I have some information from the State of California concerning those documents, but I need to get Mr. Streett together with the State of California people to determine if what they have is what he was discussing.

THE COURT: Well, we will do that in about fifteen minutes.

MR. SHEINFELD: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. DAUCHER:

Q Is misconduct one of the more frequent issues that arises in connection with the type hearing that you are involved in supervising, Mr. Streett?

A Yes, it is a major issue. I don't consider [267] myself supervising hearing, but that is a major issue, yes.

Q What percent of the hearings, with a big "H," conducted by state involve the issue of misconduct, if you can estimate that?

A As I recall, it might be about 20 percent, but I am not sure of that amount. That is my best recollection.

Q Twenty?

A There are about five major issues; misconduct is one.

Q So the best you could estimate is 20 percent of the cases which reach the formal hearing stage involve a misconduct issue?

A That would be my best recollection. I am not certain of it, but it would be high.

Q I take it from your earlier testimony in response to a question by Mr. Ball where you stated that not all contracts, in fact most contracts of employment are not

writen—I believe you went on to say that some of them are not even oral.

A This is—

Q That must mean that there must be some implied terms of a contract of employment; is that right?

A I would think so, yes.

Q Would the terms to be implied in a contract of [268] employment vary by type of employer?

A This is conceivable, yes. I would say yes, definitely.

Q In other words, the terms which might be implied in a contract of employment between a church and a teacher that it employs to teach in a school might be different from the terms that might be implied into a contract between a trucking company and a truck driver?

A That's correct.

Q Is it also conceivable that the terms to be implied in a contract could differ between churches or between denominations? In other words, the terms of a contract between the Roman Catholic Church and its employees could be different from the terms of a contract, implied terms of a contract between the Lutheran Church and its employees?

A I would think yes.

Q In determining therefore what the contract is between the employer and the employee, the hearing examiner has to determine not only the written terms of the contract and the oral terms of the contract but also the implied terms of the contract, does he not?

A Generally, yes.

Q Let me give you a hypothetical question.

[269] Assume that a teacher is a member of the Missouri Synod of the Lutheran Church. Assume that that teacher is employed to teach mathematics by a Lutheran church in a Lutheran church school. Assume that the only evidence of any contract between the church and the teacher is either a writing or an agreed-upon oral conversation in which it was agreed that the teacher would

teach according to and obey in his or her personal life the doctrine of the church.

A I see.

Q That was the extent of the understanding.

A Okay.

Q The teacher is thereafter seen smoking.

A Okay.

Q Not at school; outside of the school.

A Okay.

Q The church discharges the teacher and says, "You violated your charge. It is against the doctrine of the church to smoke. You smoked; you are fired."

A Okay.

Q The teacher says, "You are wrong. That was against the doctrine of the church forty years ago; it is no longer against the doctrine of the church. It is now the doctrine of the church that I am allowed to smoke."

A Okay.

[270] Q We have a dispute between these two parties. In resolving that dispute would you, as a hearing officer, accept evidence of the following: First, that on every bulletin board in the school there was a sign that said, "Good Lutherans don't smoke."

Would you accept that evidence?

A Yes.

Q Would you admit that?

A Yes, I think so.

Q Suppose that there was evidence presented by the church that every month for the last ten years it sent a publication to each of its parishoners on the first page of which contained a list of commandments for good Lutherans, and one of the commandments was: "Good Lutherans don't smoke."

Would you accept evidence of that in the hearing?

A Perhaps, if the teacher was on the mailing list and received this.

Q All right. Let's assume that the teacher was not on the mailing list. Would you accept evidence of that?

A I would think not. I would think it is irrelevant, although our hearings are not governed by the exclusionary rules of evidence. And if something gets into the record, even though it is found to be irrelevant, it doesn't [271] do any real damage as long as the findings of fact are supported by good evidence.

Q Suppose that first peice of evidence—suppose that this Lutheran church has twenty bishops in the state of California and the church offers to produce each of those twenty bishops to testify that every good Lutheran knows that it is against church doctrine to smoke; that's been a firmly-held part of the church's doctrine for as long as we can remember and still is. They offer to produce those twenty.

Would you hear that evidence?

A Well, my answer would vary, depending upon whether or not there was some contact between the bishops and the claimant so that the—

Q No, my example assumes no contact.

A Okay. Then I would say no.

Q My example assumed—

A I'm sorry?

Q My example assumes that these twenty bishops would testify just exactly as I have said.

A All right.

Q That it has been the doctrine of the church—We are all twenty of the bishops in the Lutheran church in California, and it has been the doctrine of the church [272] for four hundred years and it is up to today that good Lutherans don't smoke."

Would you accept that evidence?

A I would think not. It is the understanding of the claimant as to what the doctrine of the church is, and I don't think this would show the understanding of the claimant.

Q I see. So the understanding of the church as to what its doctrine is is not nearly so important as the claimant's understanding?

A No, it is the common understanding between the employer and the employee, the church and the worker.

Q Well, that isn't what you just said a minute ago, and I want to find out which is true. We are not talking about a common understanding here because in the hypothetical we have assumed that there is no understanding, Mr. Streett.

A Okay.

Q That in fact they differ as to what the doctrine of the church is. You said a moment ago it is the understanding of the claimant that is important. Is that right?

A Yes, I would say that is right. If the claimant had no understanding that this is the doctrine of the church, whether or not the claimant was correct, is very, [273] very significant in a decision as to whether or not benefits would be allowed or denied under those circumstances, because the claimant has to understand—the claimant can make an error, can misunderstand the doctrine of the church. And this in and of itself could not conceivably be construed as misconduct; it is a simple error.

Q The point that I am getting at is, Mr. Streett, this point: If I were the lawyer for the church trying to persuade you to admit this testimony of twenty bishops, I would say: "It has to be relevant to the issue of whether this fellow could have made a mistake about the doctrine of the church—"

A Okay.

Q —"as to how widely that doctrine is publicized and how universally it is accepted."

Is that not true?

A I am not—I don't see where it is relevant.

I think this—that, as I said before: Any evidence is admissible, and if it plays into the—perhaps, if it plays into the witnesses,—

Q I am asking you. You are the hearing officer. Now would you accept my offer of that evidence? Would you allow me to put that evidence on?

A I guess so. I don't, I don't—if there is an [274] offer of proof, I would—You were saying that it may have some bearing on whether the witness understood what the doctrine was, and in that situation it would be desirable evidence to get into the record.

Q Just so that we don't misunderstand what one another is saying—

A Okay.

Q —my offer of proof would be that the Lutheran Church has twenty bishops in the state of California. Each one of the twenty bishops, I tell you, will come into your hearing room and testify that it has been the doctrine of the Lutheran Church for the past four hundred years and continues right up to today to be the doctrine of the church that good Lutherans don't smoke.

A Okay.

Q And that any member of the synod should know that. That is what they will testify to.

Now, that is what I offer to present in terms of evidence at this hearing that we are having. Do you accept it or not?

A Okay. It is not the doctrine so much but what you last said: "Any member of the synod should know that." Assuming the teacher is a member of the synod, and then it would—should be accepted, the evidence should be accepted. [275] Obviously the worker would have the opportunity to show that he or she didn't know this.

Q All right. Next piece of evidence.

I produce, I offer to produce three feet of literature produced by the Lutheran Church, Missouri Synod that is generally available at Missouri Synod churches and so forth that describes or purports to describe the doctrine of the church, each piece of which contains a reference to "No Smoking."

Do you accept that evidence?

A In the same vein: Assuming the worker is a member of the synod and would have access to these documents, certainly. It deals with the understanding of the worker's obligations.

Q Suppose that the claimant wants to bring in one of my twenty bishops—I have a defector now—who will testify as follows: "It was the doctrine of the Missouri Synod until last year that smoking was forbidden, but last year that was changed."

Would you permit that testimony?

A Yes, if the—for this reason: that the worker has an understanding that, you know, understands the doctrine of the synod to be something different. Not to establish the doctrine as such, though.

[276] Q But to establish whether the worker's understanding of the doctrine is reasonable or unreasonable?

A Not reasonable or unreasonable; whether the worker understood the doctrine. I'd rather put it that way.

Q Well, I understand how you'd rather put it.

A That is why we would do it.

Q But what I'm saying presumes no contact between this twentieth bishop and the claimant.

A Okay.

Q The twentieth bishop comes in and he says, "It is reasonable that a member of the Lutheran Church, Missouri Synod could have this view regarding smoking and the synod because it changed last year; not that I talked to this fellow or he was there when I preached a sermon about this or anything else, but it is reasonable for him to have held that view."

Would you allow that testimony?

A I don't think so. I would say not.

Well, let me mention this again: We are not bound by the exclusionary rules. I would presume that if the employer had the bishops come in and this would come in to rebut it, the testimony would be accepted.

But I think you might look at the use of the evidence. I think in sifting through the evidence, in [277] writing a decision, it would be rejected by the hearing officer.

Q So what you are saying is that in arriving at an understanding with respect to the claimant's view of what the doctrine of the church was, it would not—any evidence regarding the reasonableness of that view would be inadmissible?

A No, I don't—I am not saying that. Any evidence —the evidence needs to show what the claimant knew and understood.

Q But you are not answering my question, Mr. Streett.

A Okay. Would you repeat it, please.

Q Are you saying that evidence regarding the reasonableness of the claimant's view regarding what the doctrine of the church was would be inadmissible in such a hearing?

A Only—well, it would not be inadmissible but only to show what the claimant's view was. I don't—

Am I responding to your question?

Q Well, would the evidence of whether it was reasonable for him to hold this view of what the church doctrine was be admissible or not?

MR. SHEINFELD: Your Honor, I think that it is [278] confusing the witness by having Mr. Daucher continually use the word "admissible" when the witness has testified on several occasions that the rules of evidence do not apply in these hearings.

THE COURT: That witness understands what he is saying. Overruled.

BY MR. DAUCHER:

Q Would you like me to repeat my question?

A Yes.

THE COURT: Remember, Mr. Sheinfeld, you qualified the witness. You heard his background. He understands the question.

BY MR. DAUCHER:

Q Would you allow evidence at a hearing in a dispute between a church and a terminated church employee where the issue was whether the employee was properly terminated for misconduct involving smoking, evidence of whether the claimant's view regarding the church's position on smoking was one that the claimant could reasonably have held; to allow that kind of evidence to come into a hearing that you were conducting regarding eligibility for unemployment benefits?

A Yes. I would say that any evidence that shows, that would tend to show what the claimant's understanding [279] of the contract of employment actually was, should not only be admitted but considered by the hearing officer.

Q Okay. And evidence of what the church doctrine actually is would be evidence pointing towards that, would it not?

A Perhaps so. I would say yes.

Q Therefore, it would be incumbent upon a church in such a hearing held before you to come forward with as much evidence as it could to prove to you what its doctrine really was?

A If, in the understanding, in the context that this relates to the terms of hire, then I would say yes.

Q The Lutheran Church operates four synodical colleges to train teachers for its schools. That fact has been admitted in this case.

It's also been admitted that the Lutheran Church schools prefer graduates of those colleges to other persons as teachers in their schools.

Suppose that we have a particular Lutheran school in Los Angeles. Suppose that there are fiteen teaching positions open at that school and in 1979 the school can only locate thirteen synodical graduates to teach those schools and therefore hires two non-synodical graduates. But in 1980 they have an opportunity to fill those two [280] other positions with synodical graduates; termi-

nate the two non-synodical graduates, hire the two synodical graduates.

A Okay.

Q Would the terminated non-synodical graduates be eligible for unemployment compensation?

A Yes.

Q Are you familiar with whether or not the term "misconduct" in California includes incompetence?

A Yes, I am aware that it does not.

Q It does not?

A It does not in any state.

Q If a teacher at a Lutheran, Missouri Synod church school proved himself or herself incompetent to transmit the doctrine of the synod in the school, was terminated for that reason, would that person be eligible for unemployment compensation?

A Yes.

MR. DAUCHER: I have no further questions.

THE COURT: Anything futher? Mr. Sheinfeld?

[281] REDIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Streett, to what extent does the concept of willfulness become involved in adjudications in cases involving misconduct?

A To great extent. It generally turns on whether it was willful; that is part of the interpretation of misconduct.

Q So Mr. Streett, if I could return very briefly to a hypothetical that was posed by Mr. Ball involving the employee who was terminated because of "loss of religious fervor," in that situation one of the issues was the willfull nature of that loss of fervor.

MR. BALL: Objection, your Honor. That was not my hypothetical.

THE COURT: I know it wasn't. It didn't have the word "willfull" in it.

BY MR. SHEINFELD:

Q Mr. Streett, in the case of an employee who was terminated because of "loss of religious fervor," would the willfull nature of his conduct be an issue?

A Yes, it would.

Q In what way?

A At the beginning of employment he agreed that he would follow dictrines, religious doctrines that he or she [282] knew existed. And as I understood the question, there was a gradual deterioration in this to the point that the employer felt that it was necessary to discahrge the individual. And it was done willfully with the understanding that, willfully and knowingly with the understanding that the employment contract or that the agreement at the beginning was that there would be observance of these principles, these doctrines.

MR. SHEINFELD: Thank you very much.

I have no further questions.

THE COURT: Anything further?

MR. BALL: No, your Honor.

MR. DAUCHER: No, your Honor.

THE COURT: All right.

Thank you, Mr. Streett. You may step down.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 81-31

CALIFORNIA, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.;

and

CALIFORNIA, ET AL., APPELLANTS

v.

LUTHERAN CHURCH-MISSOURI SYNOD, ET AL.

Appeal from the United States District Court
for the Central District of California

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with case No. 81-228, *United States, et al.* v. *Grace Brethren Church, et al.* and case No. 81-455, *Grace Brethren Church, et al.* v. *United States, et al.* and a total of one hour is alloted for oral argument.

November 2, 1981

SUPREME COURT OF THE UNITED STATES

No. 81-228

UNITED STATES, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

Appeal from the United States District Court
for the Central District of California

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with case No. 81-31, *California, et al. v. Grace Brethren Church, et al.* and *California, et al. v. Lutheran Church-Missouri Synod, et al.* and case No. 81-455, *Grace Brethren Church, et al.* v. *United States, et al.* and a total of one hour is alloted for oral argument.

November 2, 1981

SUPREME COURT OF THE UNITED STATES
No. 81-455

GRACE BRETHREN CHURCH, ET AL., APPELLANTS

v.

UNITED STATES, ET AL.

Appeal from the United States District Court
for the Central District of California

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with case No. 81-31, *California, et al.* v. *Grace Brethren Church, et al.* and *California, et al.* v. *Lutheran-Missouri Synod, et al.* and case No. 81-228, *United States, et al.* v. *Grace Brethren Church, et al.*, and a total of one hour is allotted for oral argument.

November 2, 1981

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